

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1933

No. 6121

476

JOSEPH S. WELLS ASSOCIATION, APPELLANT,

vs.

**GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE.**

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED NOVEMBER 25, 1933.

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1933

No. 6121

JOSEPH S. WELLS ASSOCIATION, APPELLANT,

vs.

GUY T. HELVERING, COMMISSIONER OF
INTERNAL REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

INDEX.

	Original	Print
Docket entries.....	1	1
Petition	3	3
Answer	12	8
Opinion	13	9
Decision	19	15
Stipulation of venue.....	20	16
Petition for review with notice of filing.....	21	16
Statement of evidence.....	26	20
Testimony of Wallace F. Bennett.....	29	22
Testimony of Edward L. Burton.....	35	26
Praecipe	42	31
Certificate and seal.....	44	32
Order enlarging time.....	45	33

Court of Appeals of the District of Columbia

No. 6121.

JOSEPH S. WELLS ASSOCIATION, Appellant,

vs.

GUY T. HELVERING, Commissioner of Internal Revenue.

1

Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Appearances:

For Taxpayer: J. S. Y. Ivins, Esq., Percy W. Phillips, Esq.

For Comm'r: Bernard D Hathcock, Esq

Docket Entries

1931.

Mar. 24. Petition received and filed. Taxpayer notified.
(Fee paid.)

“ 24. Copy of petition served on General Counsel.

Apr. 17. Answer filed by General Counsel.

“ 23. Copy of answer served on taxpayer. General
Calendar.

1932.

Mar. 4. Hearing set April 11, 1932.

“ 10. Motion to place on the Salt Lake City, Utah Circuit Calendar filed by taxpayer. 3/12/32
granted.

May 7. Hearing set in Salt Lake City, Utah, beginning
June 7, 1932.

Jun. 8. Hearing had before Mr. Black on merits. Submitted. Having been heard in part on motion

1932.

of the petitioner for a continuance for taking of further testimony. Continued to Washington Calendar at a later date. Called from calendar of June 7, 1932.

Jun. 8. Order of continuance to the Day Calendar for hearing in Washington at a later date agreeable to both parties and the Board entered.

“ 23. Transcript of hearing of June 8, 1932 filed.

Nov. 1. Order setting proceeding for hearing Nov. 28, 1932 to complete the hearing begun at Salt Lake City, Utah, on June 8, 1932 entered.

“ 23. Motion for continuance to Nov. 30, 1932 filed by taxpayer. 11/25/32 granted.

Nov. 30. Hearing had before Mr. Black. Submitted Briefs due in 60 days—ten days thereafter for reply brief.

Dec. 13. Transcript of hearing of Nov. 30, 1932 filed.

1933.

Jan. 26. Brief filed by General Counsel.

“ 28. Brief filed by taxpayer. 1/30/33 copy served on General Counsel.

Feb. 7. Reply brief filed by taxpayer.

Jun. 6. Opinion rendered, Mr. Black, Div. 15. Decision will be entered for respondent.

“ 10. Decision entered, Eugene Black, Div. 15.

Sep. 6. Stipulation for review by Court of Appeals of the District of Columbia filed.

“ 6. Petition for review by Court of Appeals of the District of Columbia with assignments of error filed by taxpayer.

“ 6. Proof of service filed by taxpayer.

Nov. 1. Motion for extension of 30 days to prepare and transmit record filed by taxpayer.

2

“ 1. Order enlarging time to December 4, 1933 for preparation of evidence and delivery of record entered.

“ 2. Agreed statement of evidence lodged.

“ 3. Agreed statement of evidence approved and ordered filed.

“ 8. Præcipe filed by taxpayer.

“ 8. Proof of service of præcipe filed.

3 [Stamp:] United States Board of Tax Appeals.
Filed Mar. 24, 1931.

United States Board of Tax Appeals.

Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition.

The petitioner shows:

I. The petitioner is a corporation organized under the laws of the State of Utah, with principal office at 67 West 1st South Street, Salt Lake City, Utah.

II. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on or after January 26, 1931.

III. The taxes in controversy are income taxes for the calendar year 1928 amounting to \$2,652.81.

IV. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

1. The Commissioner erred in that in making his audit of petitioner's 1928 income tax return he did not exclude from the gross income reported therein the sum of \$21,663.37, which amount was not properly taxable income under the Revenue Act of 1928.

2. The Commissioner erred in that in making his audit of petitioner's 1928 income tax return he increased the gross income reported therein by the sum of \$1,479.53, which amount was not properly taxable income under the Revenue Act of 1928.

V. Further facts upon which petitioner relies are:

1. The petitioner is a close family corporation organized by the heirs of Joseph S. Wells for the purpose of holding intact the various securities and investments of Joseph S. Wells after his death.

2. Among the stocks held by petitioner prior to the year 1928 were the stock of the Ogden Paint, Oil and Glass Company, Bennett Gasoline and Oil Company, Ogden Gasoline and Oil Company and the Bennett Glass and Paint Company.

3. W. R. Wallace and J. F. Bennett had for many years prior to 1928 been associated together in the organization, control and management of these various businesses.

4. J. F. Bennett was also a personal friend of Joseph S. Wells and has been since the organization of the petitioner and still is its president. A resolution of the petitioner's board of directors passed November 9, 1916, made J. F. Bennett the manager of the petitioner with full power to dispose of its properties.

5. In 1928 W. R. Wallace and J. F. Bennett for personal and family reasons decided to separate their interests in the various enterprises mentioned in V (2) above.

5 6. The petitioner, on the advice and order of J. F. Bennett, decided to join J. F. Bennett in the separation of its interests in these businesses from the interests of W. R. Wallace.

7. Accordingly, in August, 1928, a contract was made whereby W. R. Wallace and his interests exchanged to J. F. Bennett and his interests, which included the petitioner, their stock in the Bennett Glass and Paint Company and in return received from J. F. Bennett and his interests their stock in Ogden Paint, Oil and Glass Company, Bennett Gasoline and Oil Company and Ogden Gasoline and Oil Company.

8. The stock of the Bennett Glass and Paint Company received by the petitioner represents only a minority interest in a family corporation and was without a ready market. It could not have been sold for any sum which corresponded to its real value.

9. After the exchange of stocks, made in accordance with the Wallace-Bennett contract, it was impossible to figure the intrinsic worth of the stock of the Bennett Glass and Paint Company, and it was very problematical and uncertain what the good will of the corporation would be worth. The stock of the four companies involved in the exchange had, previous to the exchange, largely been held by common stockholders. The Ogden Paint, Oil and Glass Company bought some of its products from the Bennett Glass and Paint Company, and the Bennett Glass and Paint Company acted as a selling agent for the Bennett Gasoline and Oil Company. These last two corporations before the exchange used the same office and one office force did the work of both companies.

6

10. As a result of the exchange the common holdings in the stock of these companies were separated, the overhead of the Bennett Glass and Paint Company was increased, and it was questionable whether or not the earnings of the Bennett Glass and Paint Company would be seriously affected.

11. The petitioner filed its 1928 income tax return with the Collector of Internal Revenue for the District of Utah on or before March 15, 1929, and duly paid the tax liability shown thereon in the amount of \$2,475.27. The tax liability resulted solely from petitioner's erroneous inclusion in its gross income of a theoretical profit on the exchange of stocks, whereas in fact the stock received by the petitioner had no fair market value within the meaning of Section 111 of the Revenue Act of 1928. In the alternative, the stock received by the petitioner did not in any event have the fair market value erroneously ascribed to it by the petitioner in its return, which value the Commissioner accepted as correct.

12. Thereafter, the petitioner duly filed with the Collector at Salt Lake City, Utah, a claim for refund of the 1928 income taxes in the amount of \$2,475.27. This claim for refund was duly amended to set forth the ground that the petitioner had erroneously reported a profit from the exchange and that there was no income tax liability for the petitioner for the calendar year 1928.

7 13. The Commissioner determined a deficiency in income tax for the year 1928 in the amount of \$177.54.

14. This deficiency in tax resulted from the fact that the Commissioner increased the petitioner's reported gross income by the sum of \$1,479.53, which amount the Commissioner determined was an additional profit made on the exchange of stocks made by the Wallace-Bennett interests.

15. The same facts as mentioned in V (1)-(12) above control this addition made by the Commissioner to the petitioner's gross income with the additional fact that the sum of \$1,479.53 represented a suspense account and was so carried by the petitioner on its books throughout the calendar year 1928.

16. This suspense account resulted from the fact that it could not be definitely ascertained throughout the year 1928 just what basic values would be used in making the

exchange of stocks and thus as to the sum of \$1,479.53 the exchange of stocks was not a closed transaction in 1928.

Wherefore the petitioner prays this Board may hear the proceeding and determine that there is no deficiency and also determine that the petitioner overpaid its 1928 income taxes in the amount of \$2,475.27 and give judgment for the refund of said sum with interest thereon as provided by statute together with such other relief as it is decided petitioner is duly entitled.

J. S. Y. IVINS,
Counsel for Petitioner.

% Brewster, Ivins & Phillips, 815 Fifteenth Street N. W.,
Washington, D. C.

9 STATE OF CONNECTICUT,
County of New Haven, ss:

Hermon J. Wells, being duly sworn, says that he is Secretary and Treasurer of the Joseph S. Wells Association, and as such is duly authorized to verify the foregoing petition; that he had read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true to the best of his knowledge.

(S.) HERMON J. WELLS.

Subscribed and sworn to before me this 23rd day of March, 1931.

(S.) LEO V. SULLIVAN,
[SEAL.] *Notary Public.*

10 Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

NP-2-28.
January 26, 1931.

Joseph S. Wells Association,
% Herman J. Wells,
720 Lee Highway,
Cherrydale, Virginia.

SIRS:

You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of \$177.54 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a re-determination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,

Commissioner,

By W. F. SHERWOOD,

Acting Deputy Commissioner.

Enclosures: Statement, Form 882, Form 870.

11

Statement.

IT:AR:E-3. JAH.

In re Joseph S. Wells Association, c/o Herman J. Wells,
720 Lee Highway, Cherrydale, Virginia.

Tax Liability.

Year.	Corrected tax liability.	Tax previously assessed.	Deficiency.
1928.....	\$2,652.81	\$2,475.27	\$177.54

The report of the internal revenue agent in charge, Boston, Massachusetts, which shows additional tax due in the amount of \$177.54, a copy of which has been furnished you explaining in detail the determination of the deficiency, has been reviewed and approved by this office.

In view of the foregoing, your claim for refund of \$2,475.27, income tax for the year involved, will be rejected

and the rejection will officially appear on a schedule to be approved by the commissioner.

12 [Stamp:] United States Board of Tax Appeals.
Filed Apr. 17, 1931.

United States Board of Tax Appeals.

Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Answer.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

I. Admits the allegations contained in paragraph I of the petition.

II. Admits the allegations contained in paragraph II of the petition.

III. Admits the allegations contained in paragraph III of the petition.

IV. Denies that the Commissioner erred as alleged in paragraphs IV (1) and IV (2) of the petition.

V. Admits the allegation contained in paragraph V (1), but denies the allegations contained in paragraphs V (2) to V (16), inclusive, of the petition.

Denies generally and specifically each and every allegation set forth in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the taxpayer's appeal be denied.

(Signed)

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

O. W. SWECKER,
Special Attorney,
Bureau of Internal Revenue.

OWS/T.

13 United States Board of Tax Appeals.

Docket No. 54447.

Promulgated June 6, 1933.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Fair Market Value of Stock—Failure of Evidence to Overcome Presumptive Correctness of Commissioner's Determination.—Where in 1928 the taxpayer exchanged stock which it owned in three certain corporations for stock in another corporation and returned for taxation a profit resulting from such transaction based on what was designated in the income tax return of the taxpayer as a trading price of \$117 per share and the Commissioner accepted this figure as representing the fair market value of the stock in question in his determination of the deficiency, the correctness of the Commissioner's determination is not overcome by the testimony of expert witnesses that the stock had a fair market value of only between \$25 to \$30 per share, where an examination of the facts shows that such expert testimony is based upon a hypothetical question which furnishes inadequate information as to the factors which determine fair market value of stock.

Percy W. Phillips, Esq., for the petitioner.

F. B. Schlosser, Esq., and *Bernard D. Hathcock, Esq.*, for the respondent.

Opinion.

BLACK:

Petitioner complains of a determination of a deficiency of \$177.54 in income tax for 1928 and in addition thereto claims an overpayment of tax in the amount of \$2,475.27.

The petitioner is a corporation organized under the laws of the State of Utah. It was organized by the heirs of Joseph S. Wells for the purpose of holding together and administering certain securities owned by Joseph S. Wells

after his death. The principal office and place of business of petitioner is Salt Lake City, Utah.

During 1916 to 1924 petitioner acquired stock in three corporations at a total cost of \$10,500. During 1928 it exchanged such stock and \$53.10 in cash for 288 shares of stock in a fourth company, and \$1,479.53 in cash. In its return for the year 1928 petitioner reported a profit on the exchange of \$23,142.90, computed in Schedule B of the return as follows:

14 Kind of property.	Date acquired.	Amount received.	Cost.	Net profit.
Ogden Gasoline Co. stock....	12/ 5/16	\$6,088.68	\$800.00	\$5,288.68
Bennett Gasoline Co. stock...	12/ 5/16	9,600.00	2,000.00	7,600.00
Ogden Paint Oil & Gl. Co. stock	12/ 5/16		5,200.00	
	6/18/24	17,954.22	2,500.00	10,254.22
				23,142.90

There also appears under Schedule B of the return the following explanation: "(Received in exchange Bennett Glass and Paint Co. stock at trading price of 117.00 per share)".

The respondent accepted petitioner's valuation of the 288 shares of Bennett Glass & Paint Co. stock as \$117 per share, but determined that petitioner also should have included the cash received of \$1,479.53 as a part of the sale price, which determination resulted in the deficiency herein of \$177.54. No evidence was introduced by petitioner to the effect that it did not receive \$1,479.53 in cash in the transaction. Hence we must regard respondent's determination as to that fact as being correct. Section 111 (a) of the Revenue Act of 1928 provides that "the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113 * * * ." Section 111 (b) of the same act provides that the "amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received".

Petitioner and respondent seem to agree that the proper *basis* to be used is the amount of \$10,553.10; that respondent was correct in adding the amount of \$1,479.53 to the sale price; that under section 112 of the Revenue Act of 1928 "the entire amount of the gain or loss, determined under section 111, shall be recognized"; and that none of the ex-

ceptions to such recognition mentioned in section 112 are applicable.

Petitioner, however, contends that both petitioner and respondent were in error in finding that the 288 shares in question had a "fair market value" of \$33,696 (or \$117 per share) when received by petitioner in 1928; that such stock did not have any fair market value, or, if it did, such value was not in excess of \$30 per share and that there was no profit to petitioner in the transaction; and that petitioner is, therefore, entitled to a refund of all the taxes paid rather than liable for the deficiency determined by the respondent.

The respondent's determination is *prima facie* correct and the burden of disproving it is upon petitioner. *Austin Co. v. Commissioner*, 35 Fed. (2d) 910; *Wickwire v. Reinecke*, 275 U. S. 101. In the effort to prove that respondent's determination was wrong, petitioner offered the testimony of Wallace F. Bennett, Edward L. Burton and a Mr. Adams.

Bennett testified that he was secretary and treasurer of the Bennett Glass & Paint Co.; that he had been with the company since 1920; that he had no financial interest in petitioner; that his father organized the petitioner herein and has been the president of both petitioner and the Bennett Glass & Paint Co. since each was organized; that petitioner owned some stock in the Bennett Glass & Paint Co. and also some stock in three other companies, the Bennett Gasoline & Oil Co., Ogden Gasoline & Oil Co., and Ogden Glass & Paint Co.; that the two first named corporations had their offices in Salt Lake City and that the two last named corporations had their offices at Ogden, Utah; that the remaining stockholders of all four companies were principally the Bennett interests and W. R. Wallace; that the Bennett Gasoline & Oil Co. had been organized to take over the gasoline and oil business developed in its inception by the Bennett Glass & Paint Co.; that the operation of the last two mentioned companies was had out of the same office with the Bennett Glass & Paint Co. doing the actual merchandise business of both companies; that the Bennett Glass & Paint Co. was, as its name signifies, engaged in the glass and paint business, principally at wholesale, and jobbing lubricating oils; that the latter company had a capital stock outstanding of 6,000 shares of the par value of \$100 per share; that from 1923 to 1928, inclusive, its earnings averaged about \$42,000 per year and during these years it

paid a regular annual dividend of 6 per cent or \$36,000 a year; that from 1900 to 1928 there had been no sales of stock in any of the companies; that the stock in all the companies was closely held; that in 1928 it was agreed that petitioner and the Bennett family would take all the stock of the Bennett Glass & Paint Co. and the Wallace family would take all the stock of the other three companies; and that due to this agreement the Bennett Glass & Paint Co. lost gross profit (the business it had had with the Bennett Gasoline & Oil Co.) of between \$40,000 to \$50,000 per year with only a compensating saving in salaries of between \$14,000 to \$15,000 per year.

Burton testified that he had been in the investment banking and brokerage business in Salt Lake City for about 30 years; that he was fairly familiar with the market for unlisted stocks in 1928. The following hypothetical question was asked him by counsel for petitioner:

The evidence in this case, Mr. Burton, shows that the Joseph S. Wells Association received 288 shares of the stock of the Bennett Glass & Paint Company in 1928; that the Bennett Glass and Paint Company had 6,000 shares of the par value of \$100 each or a total capitalization of \$600,000;

16 that the earnings of that corporation for the period from 1923 to 1928, inclusive, had been approximately \$7 per share or \$42,000 a year; that the corporation had paid dividends of six per cent per year or \$36,000 per year upon its capital stock from the year 1923 to 1928, inclusive; that at the time that the Joseph S. Wells Association received this stock of the Bennett Glass and Paint Company, the corporation was about to lose or surrender business which had produced a gross profit of between forty and fifty thousand dollars per year; that the savings anticipated by reason of the loss of this business were fourteen or fifteen thousand dollars with perhaps some other minor savings which might be effected; that the testimony also showed that there had never been any sales of the stock of the Bennett Glass and Paint Company from the year 1900 to the year 1928, inclusive, and that the stock of the corporation had been held during all that time in a few hands—the hands of a very few people, mainly the Bennett and Wallace families, and that as a result of the transactions which took place in 1928, the Bennett family was acquiring the stock of the Bennett Glass and Paint Company. From

these facts are you able to state whether or not 288 shares of the capital stock of the Bennett Glass and Paint Company could have been sold, and if so, for approximately what price such a sale could have been made?

To this question, the witness answered he would not consider the stock worth over \$25 or \$30 per share marketwise; and that on account of the stock being closely held he did not believe the 288 shares could be sold at \$30 per share to anyone other than Bennett or his family or some of the clerks within the organization. Adams did not appear at the hearing, but the parties stipulated that his testimony, if produced, would be to the same effect as that given by Burton. The respondent introduced in evidence petitioner's income tax return for the taxable year involved, in which petitioner reported that it had "Received in exchange Bennett Glass and Paint Co. stock at trading price of \$117 per share."

Has petitioner overcome the prima facie determination of the respondent? We think not. Fair market value has been defined as "the cash price at which a seller willing but not compelled to sell and a buyer willing but not compelled to buy, both having reasonable knowledge of all the material circumstances, will trade." *Andrew B. C. Dohrmann*, 19 B. T. A. 507, and cases therein cited.

In the instant case, two separate and distinct interests, namely, petitioner and the Wallace interests, both dealing at arm's length, effected a transfer of stocks in which the Bennett Glass & Paint Co. stock was received by petitioner "at a trading price" of \$117 per share. For the six years previous thereto this stock having a par value of \$100 per share had been earning 7 per cent and had paid a regular annual dividend of 6 per cent. Notwithstanding these facts and the further fact that the corporation in question was a business of long standing and well established, petitioner asks us to find on the basis of Burton's and Adams' testi-

mony that the stock did not have a fair market value
17 of more than \$30 per share. The Board is not bound to accept at face value the testimony of expert witnesses, if such testimony is contrary to the best judgment of its members. *Tracy v. Commissioner*, 53 Fed. (2d) 575; *Uncasville Mfg. Co. v. Commissioner*, 55 Fed. (2d) 893; *Grand Rapids Store Equipment Corp. v. Commissioner*, 59 Fed. (2d) 914; *Keystone Steel & Wire Co. v. Commis-*

sioner, 62 Fed. (2d) 458; and *American Chemical Paint Co.*, 25 B. T. A. 1208. It is true that the testimony shows that by reason of the rearrangement of business interests between the Wallaces and the Bennetts, the Bennett Glass & Paint Co. lost from \$40,000 to \$50,000 gross business which it had previously had with the Bennett Gasoline & Oil Co., with an ability to effect a corresponding saving in salaries of between \$14,000 to \$15,000 annually. But this fact was clearly known to all of the parties when they arrived at a "trading value" of \$117 per share. It must therefore be assumed that in arriving at the fair market value of the stock in question due allowance had already been made for the loss of business, which seemed to be the principal factor considered by Burton in arriving at his opinion of value. Burton, in answering the hypothetical question put to him, knew nothing concerning the assets owned by the Bennett Glass & Paint Co., nor the gross annual business done. Ever since the enactment of the Revenue Act of 1924, Congress has provided that "In determining the fair market value of stock in a corporation as of March 1, 1913, due regard shall be given to the fair market value of the assets of the corporation as of that date." See sections 204 (b) of the Revenue Acts of 1924 and 1926, section 113 (b) of the Revenue Act of 1928, and section 113 (a) (13) of the Revenue Act of 1932. Although Congress has not made the same requirement in valuing stock in a corporation as of a time other than March 1, 1913, yet it is a factor that might well have been considered in the instant case. As we have already pointed out, Wallace F. Bennett, secretary and treasurer of the Bennett Glass & Paint Co., testified at the hearing, but he gave no testimony concerning the assets of the company which were behind the stock, and which would under ordinary circumstances to some extent at least determine its fair market value. Cf. *Commissioner v. Swenson*, 56 Fed. (2d) 544. We have also pointed out, that the company was capitalized at \$600,000 and the witness gave no evidence that the capital was impaired at the time we are asked to find that stock having a par value of \$100 per share, and paying an annual dividend of \$6 per share, had only a fair market value of \$30 per share. Nor did he give any testimony that this loss in gross profits due to the loss in gasoline and lubricating oil business was not made up in some other way, nor did he give any testimony that this

18 loss in business caused the corporation thereafter to operate on a nonprofit basis and to cease its payment of dividends or even to reduce them. What the situation was in that respect, we do not know. What we do know is that for six years, including the year 1928, the taxable year which is before us, the corporation had paid a dividend of 6 per cent on a par valuation of \$100 per share. To say that a stock in a well established business, which for the six preceding years had paid an annual dividend of 6 per cent on its par value, and which was actually exchanged at a "trading value" of \$117 per share, according to the statement made in petitioner's own income tax return, and with no evidence that the capital of the corporation had become impaired, had a "fair market value" on the date of the exchange of only \$30 per share, seems to us unreasonable and contrary to the actual conditions and circumstances of the case, and we feel compelled to hold that the evidence introduced by petitioner is insufficient to overcome the prima facie correctness of the determination made by the respondent.

It follows that the determination made by the respondent must stand.

Reviewed by the Board.

Decision will be entered for the respondent.

19 United States Board of Tax Appeals, Washington.
Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Decision.

Pursuant to the determination of the Board, as set forth in its report promulgated June 6, 1933, it is

Ordered and decided that there is a deficiency of \$177.54 for the year 1928.

Enter.

[Seal U. S. Board of Tax Appeals.]

(Signed)

EUGENE BLACK,

Member.

Entered Jun. 10, 1933.

20 [Stamp:] United States Board of Tax Appeals.
Filed Sep. 6, 1933.

In the Court of Appeals of the District of Columbia.

B. T. A. Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

*Stipulation for Review of the Decision of the United States
Board of Tax Appeals.*

Pursuant to section 1002 (d) of the Revenue Act of 1928,
the petitioner and the respondent, through their respective
counsel, hereby stipulate that the Court of Appeals of the
District of Columbia shall have jurisdiction to review the
decision of the Board of Tax Appeals in this case.

J. S. Y. IVINS,
Attorney for Petitioner.

PAT MALLOY,
Asst. Atty. Gen., for Respondent.

21 [Stamp:] United States Board of Tax Appeals.
Filed Sep. 6, 1933.

In the Court of Appeals of the District of Columbia.

B. T. A. Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

*Petition for Review of Decision of the United States Board
of Tax Appeals.*

To the Court of Appeals of the District of Columbia:

Your petitioner, Joseph S. Wells Association, states:

I. This is a petition for review by the Court of Appeals
of the District of Columbia of a decision of the United

States Board of Tax Appeals promulgated June 6, 1933, the final order in which was entered June 10, 1933, determining a deficiency in federal income taxes against the petitioner for the year 1928 in the amount of \$177.54, and refusing to determine an overpayment in federal income tax in favor of the petitioner for the year 1928 in the amount of \$2,475.27.

II. The petitioner and the respondent have entered into an agreement pursuant to section 1002 (d) of the Revenue Act of 1926 stipulating that the Court of Appeals of the District of Columbia shall have jurisdiction to review the decision of the Board of Tax Appeals in this case.

22 III. The nature of the controversy before the Board of Tax Appeals was the determination of federal income taxes under the Revenue Act of 1928 involving the question of the amount of profit, if any, received by petitioner in 1928 as a result of an exchange by it of stock which it owned in three certain corporations (Ogden Gasoline Co., Bennett Gasoline Co., and Ogden Paint, Oil & Glass Co.) for stock in another corporation (Bennett Glass & Paint Co.).

IV. The errors upon which the petitioner relies are:

1. The Board erred in not finding that the stock of the Bennett Glass & Paint Co. received by petitioner in the exchange that occurred in 1928 did not have a fair market value in excess of \$25 per share.

2. The Board erred in finding that the stock of Bennett Glass & Paint Co. received by the petitioner in 1928 as a result of the exchange had a fair market value in excess of \$25 per share.

3. The Board erred in finding that the fair exchange value of the stock of the Bennett Glass & Paint Co. received by petitioner in 1928 as a result of the exchange of stock has a fair market value of \$117 per share.

4. The decision of the Board is contrary to the uncontradicted and uncontroverted evidence before it.

5. The decision of the Board is not supported by the evidence.

23 6. The Board based its decision upon statements of fact and conclusions therefrom which find no support in the record and which, in some instances, are directly contrary to the evidence.

7. There is no evidence in the record to support the finding of the Board that the stock of the Bennett Glass & Paint Co. received by petitioner in the exchange that occurred in 1928, had a fair market value of \$117 per share.

8. The Board erred in finding any deficiency in tax as regards the petitioner and in not finding that the petitioner had overpaid its taxes for 1928.

Wherefore your petitioner prays that this Court may review the decision of the Board of Tax Appeals, reverse such decision and direct the Board of Tax Appeals to enter a decision determining that there is no deficiency in petitioner's federal income taxes for 1928, and further that the petitioner has overpaid its federal income taxes for 1928 in the sum of \$2,475.27, and for such other and further relief as may to this Court appear proper in the premises.

J. S. Y. IVINS,

Attorney for Petitioner.

c/o Brewster, Ivins & Phillips, 805 Fifteenth Street
N. W., Washington, D. C.

24

Affidavit.

DISTRICT OF COLUMBIA, ss:

J. S. Y. Ivins says: I am the attorney for the petitioner in this proceeding. I prepared the foregoing petition for review and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information and belief. This petition is not filed for purposes of delay. I believe the petitioner justly entitled to the relief sought.

J. S. Y. IVINS.

Subscribed and sworn to before me this 6th day of September, 1933.

[SEAL.]

LENORA DENNA BOWERS,

Notary Public, D. C.

25 [Stamp:] United States Board of Tax Appeals.
Filed Sep. 6, 1933.

In the Court of Appeals of the District of Columbia.

B. T. A. Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Notice.

To the Commissioner of Internal Revenue,
Washington, D. C.

SIR:

Please take notice that the annexed is a copy of the petition filed with the Board of Tax Appeals on September 6th, 1933, for review by the Court of Appeals of the District of Columbia of the decision of the Board of Tax Appeals rendered in the above cause.

J. S. Y. IVINS,
Attorney for Petitioner.

I hereby acknowledge receipt on the 6th day of September, 1933, of a copy of the petition for review filed in the above cause, together with notice of filing thereof.

COMMISSIONER OF INTERNAL
REVENUE,

By E. BARRETT PRETTYMAN,

*General Counsel,
Bureau of Internal Revenue.*

26 [Stamp:] United States Board of Tax Appeals.
Lodged Nov. 2, 1933.

[Stamp:] United States Board of Tax Appeals. Filed
Nov. 3, 1933.

In the Court of Appeals of the District of Columbia.

Board of Tax Appeals Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Statement of the Evidence.

The following is a statement of the evidence in narrative form in the above entitled cause:

The proceedings came on for hearing, pursuant to notice, on June 8, 1932, at Salt Lake City, Utah, before the Honorable Eugene Black, Member of the United States Board of Tax Appeals, whereupon the following proceedings were had.

Percy W. Phillips, Esq., Washington, D. C., appeared on behalf of the petitioner. F. B. Schlosser, Esq., appeared on behalf of the Commissioner of Internal Revenue. After opening statements by counsel for both sides, Petitioner's Exhibit 1 was introduced in evidence, to show how the respondent computed the deficiency in this case. The material portions of Petitioner's Exhibit 1, which was a letter from T. M. Kenefick, Internal Revenue Agent in Charge, Boston Division, to J. S. Wells Association, c/o Herman J. Wells, 720 Lee Highway, Cherrydale, Virginia, are as follows:

27 "Treasury Department, Internal Revenue Service,
Statler Bldg., Boston Mass.

August 27, 1930.

Year covered: 1928.

"There is attached a statement of adjustments which this office proposes to recommend, affecting your income

tax liability. If the adjustments suggested are satisfactory, and you do not desire to file a protest, the inclosed agreement form should be signed by you and forwarded to this office. Interest is payable on deficiencies found due as set forth on the attached Form 882. * * *

Preliminary Statement.

Summary.

Year.	Tax per return.	Tax as corrected.	Additional tax.
1928	\$2,475.27	\$2,652.81	\$177.54

“The principal cause of the additional tax is due to the inclusion in income of the cash received in connection with the sale of securities.

“The treasurer of the corporation has left Boston and is now located in a suburb of Washington, D. C., therefore, it has been impossible to explain the changes in person or to determine the treasurer’s basis for filing claim.

“It is the examining officer’s belief that the claim was based on Section 112 (b) (1) but this section does not apply to this case. The section quoted is as follows (b) Exchanges solely in kind. (1) Property held for use or investment. No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidence of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment.

28

“SCHEDULE 1.

Year Ended Dec. 31, 1928.

Net Income.

Net income as disclosed by books	\$28,443.65
As corrected	25,106.78
Net adjustment	3,336.87

26 [Stamp:] United States Board of Tax Appeals.
Lodged Nov. 2, 1933.

[Stamp:] United States Board of Tax Appeals. Filed
Nov. 3, 1933.

In the Court of Appeals of the District of Columbia.

Board of Tax Appeals Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

vs.

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28

“SCHEDULE 1.

Year Ended Dec. 31, 1928.

Net Income.

Net income as disclosed by books	\$28,443.65
As corrected	25,106.78
Net adjustment	3,336.87

Unallowable deductions and additional income:

(a) Sale of securities	1,479.53	
Total		1,479.53

Non-taxable income and additional deductions:

(b) Non-taxable dividends	4,816.40	4,816.40
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Net adjustment as above		3,336.87
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SCHEDULE 1-A.

Explanation of Items.

(a) Represents cash received in connection with the exchange of stocks, which constitutes part of the sales price and consequently should be included in 1928 income.

(b) Represents income from dividends of domestic corporations.

The corporation received 288 shares of Bennett

Glass and Paint worth	\$33,696.00
for which it paid in cash	53.10

Net value received	33,642.90
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The corporation gave in exchange stocks costing as follows:

Ogden Paint Oil and Glass Co.	7,700.00	
Bennett Gasoline Co.	2,000.00	
Ogden " "	800.00	
		10,500.00

Net profit in addition to that shown in (a) above	23,142.90
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All other items of income and expense were found correct as reported. * * *

29 Thereupon **Wallace F. Bennett** was called as a witness on behalf of the petitioner, and being duly sworn, was examined and testified as follows:

My name is Wallace F. Bennett. I reside at 469 B Street, Salt Lake City. I have been Secretary and Treasurer of the Bennett Glass & Paint Co. since 1920. I started in as an office boy and worked up to my present job. I have been a director of the company since 1923.

30 My father organized the Wells Association after the death of his friend Joseph S. Wells, when he became the executor of the estate and the guardian of Mr. Wells' minor children, and he is now President and has been since it was organized. My father (John Bennett) has been President and Manager of the Bennett Glass & Paint Co. ever since it was organized. He is at present under the doctor's care and has been away from the office for nearly a month.

The relationship which existed between the stockholders of the Bennett Glass & Paint Co., the Bennett Gasoline & Oil Co., the Ogden Gasoline & Oil Co., and the Ogden Glass & Paint Co. was that the stockholders of the Bennett Glass & Paint Co. and the Bennett Gasoline & Oil Co. were identical as far as personnel was concerned. There may have been some little variation in proportion to their stockholdings. I don't know exactly what they were. In the two Ogden companies there was one other stockholder, Mr. W. H. Harris, but all the stockholders of the Salt Lake companies were also stockholders in the Ogden companies in much the same proportion as the Salt Lake holdings. The Wells Association owned stock in all four companies.

The Bennett Gasoline & Oil Co. was organized to take over the gasoline and oil business developed in its inception by the Bennett Glass & Paint Co. The operation of the two companies was done at the same office and, except for differences in bookkeeping sets, you would have had a hard time to distinguish between them. As the gasoline business grew, the Bennett Glass & Paint Co., which was the older organization, did the actual merchandise business of both companies.

31 Mr. W. J. Bennett, or Will Bennett, before his death was Secretary and Treasurer of the Bennett Glass & Paint Co. and of the Bennett Gasoline & Oil Co., held the same office in both companies and was in charge and was the active manager of the Gasoline & Oil Co. He died early in December, 1927.

The Bennett Glass & Paint Co. was also engaged in the glass and paint business and the jobbing of lubricating oils. 95 per cent of its business was wholesale. They did a little retail business out of their store. Mr. John Bennett has always been the manager and in active charge of the glass and paint end of the business. Mr. John Bennett had a very severe breakdown in 1925; and the death of his brother in 1927 brought on a recurrence of that condition and he was in a serious condition in 1928.

On the death of Mr. Will Bennett, Mr. W. R. Wallace's son (Henry A. Wallace) took over the active operation of the gasoline business.

The principal stockholders in these four corporations were: Mr. John Bennett and Mr. W. R. Wallace, each of whom held a very large share of stock.

"Mr. Phillips: Did you in 1928 come to a point where it seemed advisable to split up the business between the two families?

"Mr. Bennett: Yes, sir.

"Mr. Phillips: How was that done?

32 "Mr. Bennett: That was done by a series of discussions, conferences on the subject, and finally by the Bennett family taking the stock of the Bennett Glass & Paint Company and Mr. Wallace taking the stocks of the other companies.

"Mr. Phillips: And did the Wells Association join the Bennett interests in surrendering their stock in the three other companies and taking stock in the Bennett Glass & Paint Company?

"Mr. Bennett: Yes, sir.

"Mr. Schlosser: If your Honor please, I don't believe any connection has been shown between this witness and the petitioner, the Wells Association. I don't believe he is qualified to answer that question at this point.

"The Member: Seems to be no issue but that there was this exchange of stock so I wouldn't see any objection to the testimony.

"Mr. Schlosser: It has not been shown he has any connection with the petitioner here; he is asked the question as to whether or not the petitioner took any part of this exchange of stocks.

"The Member: The only purpose I see in this testimony is to give the Board a background of what occurred. As I

understand from the preliminary statement both parties are agreed that this exchange took place, and the only question for the Board to decide, as I see it, is whether or not the contention of the petitioner is true that it had no fair market value at the time of the exchange.

33 “Mr. Schlosser: The respondent is informed and believes there was a contract to which the petitioner here was a party. It is not shown this witness is connected with the petitioner in any way; he is a member of one of the families involved; I don't believe he has any connection——

“The Member: Up to now it is only a general question as to whether this exchange took place, so I overrule the objection.

“Mr. Schlosser: May I have an exception?

“The Member: Yes, sir.”

There were no sales of the stock of the Bennett Glass & Paint Co. between 1900-1928, although there were some transfers within the family. My father gave me some shares at one point along the line and some other members of the family. The holdings of the two major stockholders, John Bennett and W. R. Wallace, were, between 1900 and 1928, divided up to a certain extent within the respective families but there were no sales.

The Bennett Glass & Paint Co. regularly paid dividends of 6% between 1923 and 1928. Their earnings during those years were approximately 7%. In 1928 the Bennett Glass & Paint Co. had 6,000 shares outstanding of the par value of 100 each, and the dividends were \$36,000 a year. Their earnings averaged about \$42,000 a year.

At the time the stock of the Bennett Gasoline & Oil Co. was taken over by the Wallace interests in 1928, they took over the gasoline and oil business which had been
34 operated by the Bennett Gasoline & Paint Co. Before that time the Bennett Glass & Paint Co. had acted as purchasing agents for the gasoline of the Bennett Gasoline & Oil Co. and made a charge of a cent and a half a gallon for that service. They received for this service from \$25,000 to \$35,000 a year depending upon the volume of business.

As regards the lubricating oil business, the Bennett Glass & Paint Co. were buying and selling for their own account,

and during the years preceding 1928 they did about \$50,000 a year business in lubricating oils. The profit on that business varies from 25% to 30% of the gross earnings so that the company received between \$12,000 and \$15,000 a year profit from the sale of lubricating oils.

The Bennett Glass & Paint Co. lost the above mentioned sources of revenue at the time the stock of the two companies was split up between the two families, for the lubricating oil business was turned over to the Gasoline & Oil Co. In other words, they lost approximately \$40,000 to \$50,000 a year of gross profit.

As a compensating factor to the above mentioned loss, it can be said that when the gasoline business was taken out of the paint company's office, it was possible to reduce the force somewhat. I imagine it represented a saving of \$14,000 or \$15,000 a year in salaries but it was not possible to dispose of any buildings or reduce any other of the fixed overhead expenses. It was not possible to reduce appreciably any of the other expenses of the company.

I have no financial interest in the Joseph S. Wells Association.

35 There was no cross-examination of this witness.

Whereupon **Edward L. Burton** was called as a witness on behalf of the petitioner, and having been first duly sworn, testified as follows:

My name is Edward L. Burton and I reside at 1442 Circle Way, Salt Lake City, Utah. I am in the investment banking and brokerage business in Salt Lake City and have been in such business upwards of thirty years. I buy and sell for my own account and for others both listed and unlisted securities. Such buying and selling stocks is substantially all of our business. It is about the only thing we do. I think I am fairly familiar with most of the markets for unlisted securities in Salt Lake City in 1928. I knew the Bennett Glass & Paint Co. in 1928.

"Mr. Schlosser: If your Honor please, I question if this testimony now about to be elicited is relevant. I do not believe any evidence has been introduced to show that the petitioner in this case ever received any Bennett Glass & Paint Company stock.

"The Member: Isn't that admitted?

“Mr. Schlosser: There is nothing admitted, your Honor.

“Mr. Phillips: The revenue agent’s report shows; that is the whole basis of the report. If general counsel will concede the petitioner did not receive any Bennett Glass & Paint Company stock, then there is certainly no deficiency in this case and we are entitled to a refund of the full amount.

“Mr. Schlosser: The Board has held in numerous cases that a revenue agent’s report is not evidence. There was in this case a contract which governs this transaction. Counsel is trying to keep that contract out and is using as evidence of the transaction a revenue agent’s report.

36 “The Member: He has not asked this witness—of course when you come to a question of valuation, that is another matter.

“Mr. Schlosser: He was about to ask him.

“The Member: I had understood the whole deficiency was based on the fact there was an exchange of stock, and that being the case I don’t see that that would be one of the issues.

“Mr. Schlosser: Conceding that is the issue, there must be certain facts proven——

“The Member: The question of valuation is the main issue as I understand it.

“Mr. Schlosser: There must be some proof the petitioner acquired the stock.

“The Member: The fact the Commissioner has based a deficiency on that very ground it seems to me would make it wholly unnecessary to prove that fact, because there would be no deficiency if there wasn’t any exchange of stock.

“Mr. Schlosser: I take it it is your Honor’s opinion that anything in the notice of deficiency or in the revenue agent’s report is evidence?

“The Member: No, I don’t think that.

“Mr. Schlosser: Is there any evidence in this case that there was an exchange of stock?

“The Member: I suppose the deficiency letter in the pleadings shows that. I am not undertaking to pass from the Bench upon any issue; I would have to read the pleadings. I overrule the objection.

“Mr. Schlosser: May I have an exception, your Honor?

“The Member: Yes, note an exception.”

37 “Mr. Phillips: The evidence in this case, Mr. Burton, shows that the Joseph S. Wells Association received 288 shares of the stock of the Bennett Glass & Paint Company in 1928; that the Bennett Glass & Paint Company had 6,000 shares of the par value of \$100.00 each or a total capitalization of \$600,000.00; that the earnings of that corporation for the period from 1923 to 1928 inclusive had been approximately \$7.00 per share or \$42,000.00 a year.

 “Mr. Burton: That is \$42,000.00 on their entire capital?

 “Mr. Phillips: Yes. That the Bennett Glass & Paint Company had paid dividends of six per cent per year or \$36,000.00 per year upon their capital stock from the year 1923 to 1928 inclusive. That at the time the Joseph S. Wells Association received this stock of the Bennett Glass & Paint Company the Bennett Glass & Paint Company was about to lose or surrender business which had produced a gross profit of between forty and fifty thousand dollars per year; that the savings anticipated by reason of the loss of this business were fourteen or fifteen thousand dollars per year with perhaps some other minor savings which might be effected. The testimony also shows that there had never been any sales of the stock of the Bennett Glass & Paint Company from the year 1900 to the year 1928 inclusive, and that the stock of the corporation had been held during all that time in a few hands—the hands of a very few people, mainly the Bennett and Wallace families, and that as a result of the transactions which took place in 1928 the Bennett family was acquiring the stock of the Bennett Glass & Paint Company. From those facts are you able to

38 state whether or not 288 shares of the capital stock of the Bennett Glass & Paint Company could have been sold, and if so for approximately what price such a sale could have been made.

 “Mr. Schlosser: Objection is raised to the question. I assume your Honor will overrule the objection, and I take an exception.

 “The Member: Very well; I overrule the objection and note respondent’s exception.

 “Mr. Burton: Let me ask again so I get that clear; the company earned \$42,000.00 on an average net year after year?

 “Mr. Phillips: From 1923 to 1928 inclusive.

 “Mr. Burton: Then you estimate that the net loss would be \$15,000.00, cutting it down——

“Mr. Phillips: No; the testimony of Mr. Bennett shows that from the gasoline and oil business which had been conducted between the years 1923 and 1928 by the Bennett Glass & Paint Company they had received gross profits of between \$40,000.00 and \$50,000.00 and that they were surrendering that business.

“Mr. Burton: Yes.

“Mr. Phillips: And as a result of the surrender of that business they figured they could reduce their expenses by \$14,000.00 or \$15,000.00 or thereabouts.

“Mr. Burton: Well, then, I suppose I am to assume that they are going to lose \$30,000.00 in net revenue?

“Mr. Phillips: Unless they can make it up from some other source of business—unless they can increase their business.

39 “Mr. Burton: Well, only got a revenue, a net revenue of \$15,000.00 to be divided between—is the capital \$600,000.00 par value?

“Mr. Phillips: \$600,000.00 par value.

“Mr. Burton: That is six thousand shares. Marketwise I would not consider the stock worth over \$25.00 or \$30.00 a share even if it were held generally, with that kind of showing; it would have to produce eight or ten per cent gross net—that is net gross of 8% to 10% I would say to make it worth \$25.00 to \$30.00, marketwise.

“Mr. Phillips: Have you found in your experience that there is a ready market for the minority shares of a family corporation?

“Mr. Burton: No, I have not. As a matter of fact as a close corporation I don't believe the shares could be sold at \$30.00 to any one other than Mr. Bennett or his family or some of the clerks within the organization, with that kind of showing, losing this revenue.

“Mr. Phillips: Outside of the Bennett family and the employees would there be any market for this stock?

“Mr. Burton: Not as large a block as that. I have found in my experience that the nuisance value of a small block of stock sometimes is worth something, that is for information that one competitor could glean from another—the nuisance value; but I don't believe that 288 shares could be sold for a substantial amount for nuisance value.

“Mr. Phillips: Do you find that generally there is a substantial difference between the price at which a minority

interest and a majority interest in stock in various corporations can be sold?

40 "Mr. Burton: Generally speaking the public won't buy a minority interest in this type of organization."

There was no cross-examination of Mr. Burton by counsel for the respondent.

It was stipulated by and between the parties that if Mr. Adams, Vice-President of the Utah State National Bank, with whom Bennett Glass & Paint Co. did its banking business, were called, his testimony would be to the same effect as that given by Mr. Burton.

Upon consent of counsel for both parties the case was continued to the Washington calendar and came on for further hearing in Washington on November 30, 1932. At this hearing counsel for the respondent introduced Respondent's Exhibit A, which was the corporation income tax return of the petitioner for the calendar year 1928. The material portions of this exhibit are contained in Schedule B of said return. Schedule B is as follows:

"SCHEDULE B.

Profit from Sale of Real Estate, Stocks, Bonds, etc.

(See Instruction 8.)

Kind of property.	Date acquired.	Amount received.	Cost.	Net profit.
Ogden Gasoline Co. Stock..	12- 5-1916	\$6,088.68	\$800.00	\$5,288.68
Bennett Gasoline Co. Stock.	12- 5-1916	9,600.00	2,000.00	7,600.00
Ogden Paint. Oil & Glass Co. Stock.....	{ 12- 5-1916 } { 6-18-1924 }	17,954.22	2,500.00	10,254.22
Total				<u>23,142.90</u>

(Received in exchange Bennett Glass and Paint Co. stock at trading price of 117.00 per share.)

State how property was acquired. By purchase."

41 The foregoing evidence is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and is submitted for approval by the United States Board of Tax Appeals.

PERCY W. PHILLIPS,
Counsel for Petitioner.

c/o Brewster, Ivins & Phillips, 805 Fifteenth Street
N. W., Washington, D. C.

The foregoing is all of the material evidence adduced at the hearing before the Board of Tax Appeals, and the same is approved by the undersigned as attorney for the respondent on review.

E. BARRETT PRETTYMAN,
*General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent on Review.*

This statement of evidence is duly approved and settled this 3rd day of November, 1933.

(S.) LOGAN MORRIS,
Member United States Board of Tax Appeals.

42 [Stamp:] United States Board of Tax Appeals.
Filed Nov. 8, 1933.

United States Board of Tax Appeals.

Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Præcipe for Transcript of Record.

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, and within the time prescribed by law therefor, or such time as extended by order of the Board of Tax Appeals, transmit and deliver to the Clerk of the United States Court of Appeals for the District of Columbia, copies of the following documents duly certified:

1. Docket entries of all proceedings before the Board of Tax Appeals.
2. All pleadings before the Board of Tax Appeals.
3. Opinion and decision of the Board of Tax Appeals.
4. Petition for review showing notice of filing and acceptance of service by respondent.

5. The statement of the evidence as settled and approved by the Board of Tax Appeals.

6. This præcipe for the record.

43 The foregoing to be prepared, certified, and transmitted as required by law and the rules of the Court of Appeals for the District of Columbia.

PERCY W. PHILLIPS,

Counsel for Petitioner.

c/o Brewster, Ivins & Phillips, 805 Fifteenth Street N. W., Washington, D. C.

44 United States Board of Tax Appeals, Washington.

Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Certificate.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 43, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Præcipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 22nd day of November, 1933.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk United States Board of Tax Appeals.

45

United States Board of Tax Appeals.

Docket No. 54447.

JOSEPH S. WELLS ASSOCIATION, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order Enlarging Time.

On motion of counsel for the petitioner and consent of counsel for the respondent, it is

Ordered that the time for preparation of the evidence and transmission and delivery of the record *sur* petition for review of the above entitled proceeding by the Court of Appeals, District of Columbia, be and it is hereby extended to December 4, 1933.

(Signed)

LOGAN MORRIS,

Member.

Dated Washington, D. C., November 1, 1933.

Now, Nov. 22, 1933, the foregoing order certified from the record as a true copy.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,

Clerk Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 6121. Joseph S. Wells Association, appellant, vs. Guy T. Helvering, Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Nov. 25, 1933. Henry W. Hodges, Clerk.

(4263)

JAN 1 3 1934

Henry H. Hodges
BRIEF FOR APPELLANT

IN THE
Court of Appeals for the District of Columbia

No. 6121

OCTOBER TERM, 1933

JOSEPH S. WELLS ASSOCIATION,
APPELLANT,

v.

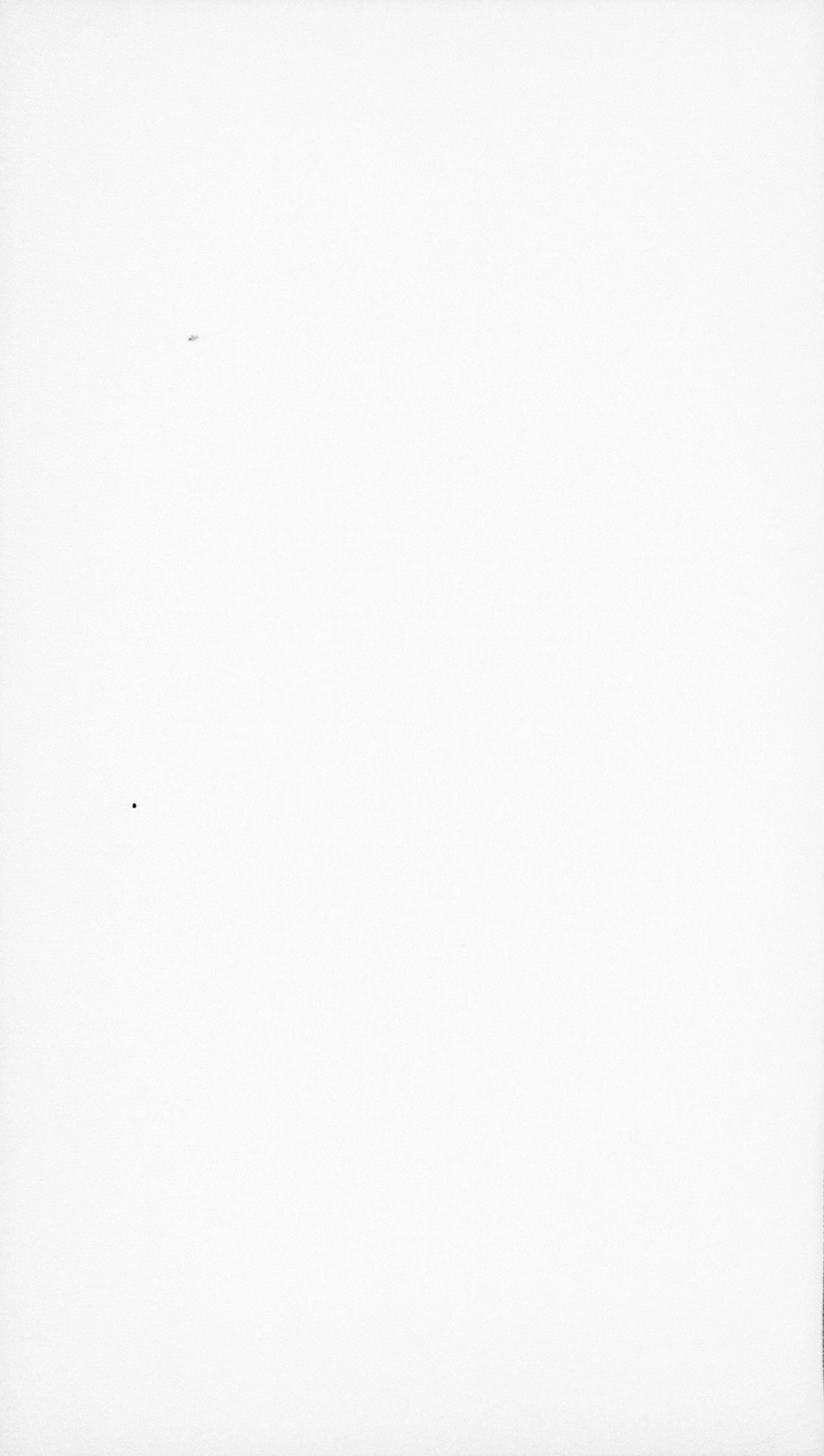
GUY T. HELVERING,
COMMISSIONER OF INTERNAL REVENUE,
APPELLEE

On Petition to Review Decision of the United States
Board of Tax Appeals

J. S. Y. IVINS,
PERCY W. PHILLIPS,
Southern Building,
Washington, D. C.

Of Counsel:

KINGMAN BREWSTER
O. R. FOLSOM-JONES
RICHARD B. BARKER



INDEX

	Page
STATEMENT OF CASE.....	1
Prior Proceedings.....	1
The Facts.....	2
ERRORS RELIED UPON.....	5
SUMMARY OF ARGUMENT.....	6
ARGUMENT.....	7
I. Upon an exchange, the taxpayer is taxable only upon the difference between the cost of the property surrendered and the fair market value of the property received, plus cash received.....	7
II. The stock of Bennett Glass & Paint Com- pany received upon the exchange did not have a fair market value of more than \$25 to \$30 per share.....	8
III. The decision of the Board is contrary to the uncontradicted evidence and is not sup- ported by any evidence.....	13
IV. The decision of the Board is based upon its erroneous assumption that it may reject testimony of expert witnesses, in its un- controlled discretion.....	19
CONCLUSION.....	26

CASES CITED

	Page
American Chemical Paint Co. v. Commissioner, 66 Fed. (2d) 381.....	20
Boggs & Buhl, Inc. v. Commissioner, 34 Fed. (2d) 859.....	22
Chicago Railway Equipment Co. v. Blair, 20 Fed. (2d) 10.....	21
Dempster Mill Manufacturing Co. v. Burnet, 46 Fed. (2d) 604.....	12, 20
Dwight & Lloyd Sintering Co., Inc., 1 B. T. A. 179, 185.....	18
Heiner v. Crosby, 24 Fed. (2d) 191.....	10
Holters Co., 16 B. T. A. 325, 332.....	18
Ithaca Trust Co. v. United States, 279 U. S. 151; 49 S. Ct. 291.....	18
Nichols v. Commissioner, 44 Fed. (2d) 157... 12, 23, 25	25
Norfolk National Bank of Commerce, 66 Fed. (2d) 48.	25
Pittsburgh Hotels Co. v. Commissioner, 43 Fed. (2d) 345.....	22
Planters Operating Co. v. Commissioner, 55 Fed. (2d) 583.....	24
Rice v. Commissioner, 47 Fed. (2d) 99.....	15, 24
Sioux City Stockyards Company v. Commissioner, 59 Fed. (2d) 944.....	24
Tex-Penn Oil Company, 28 B. T. A. 917.....	

STATUTES CITED

Revenue Act of 1928:

Section 111.....	7
Section 113.....	7

In the Court of Appeals for the District of Columbia

No. 6121

OCTOBER TERM, 1933

JOSEPH S. WELLS ASSOCIATION,
APPELLANT,

v.

GUY T. HELVERING,
COMMISSIONER OF INTERNAL REVENUE,
APPELLEE

On Petition to Review Decision of the United States
Board of Tax Appeals

BRIEF FOR APPELLANT

STATEMENT OF CASE

Prior Proceedings

This is a proceeding under section 1001 of the Revenue Act of 1926 for the review of a decision of the United States Board of Tax Appeals.

The proceeding was commenced before the United States Board of Tax Appeals on March 24, 1931, by the filing of a petition. A hearing was held and testimony introduced before Honorable Eugene Black, a Member of the Board, on June 8, 1932, at Salt Lake City, Utah, and on November 30,

1932, at Washington, D. C. On June 6, 1933, the findings of fact and opinion of the Member were filed with the Clerk of the Board. This report of the Member was not reviewed by the Board. On June 10, an order or decision was entered, pursuant to the opinion, in favor of the Commissioner of Internal Revenue. On September 6th a stipulation for review of this decision by the Court of Appeals of the District of Columbia was filed with the Board and on the same day the petition for review was filed.

The Facts¹

The appellant (hereafter referred to as the taxpayer) is a corporation organized under the laws of the State of Utah, with its principal office at 67 West 1st South Street, Salt Lake City, Utah. (Pleadings) It is a close family corporation organized by John Bennett when he became the executor of the Estate of Joseph S. Wells and guardian of Mr. Wells' minor children, for the purpose of holding intact the various securities and investments of Joseph S. Wells after his death. John Bennett was at all times president of this taxpayer. (Pleadings; R. p. 23, f. 30)

The taxpayer owned stock in Bennett Glass & Paint Company, Bennett Gasoline & Oil Company, Ogden Gasoline & Oil Company and Ogden Glass & Paint Company. The stockholders of Bennett Glass & Paint Company and Bennett Gasoline & Oil Company were identical as to personnel, with

¹ References are to the pages and folios in the Transcript of Record before this court.

some small variations in the proportions of their holdings. In the two Ogden companies there was one other stockholder, W. H. Harris. All the stockholders in the two Bennett companies were stockholders in the two Ogden companies in much the same proportion as their holdings in the Bennett companies. (R. p. 23, f. 30)

John Bennett and W. R. Wallace were the two largest stockholders in these four companies. (R. p. 24, f. 31) Bennett Glass & Paint Company had developed a gasoline and oil business which Bennett Gasoline & Oil Company was organized to take over. (R. p. 23, f. 33) John Bennett was president and manager of Bennett Glass & Paint Company (T. 8) and Will Bennett was in active management of Bennett Gasoline & Oil Company. (R. p. 23, f. 31) In December 1927 Will Bennett died and John Bennett suffered a recurrence of a nervous breakdown. (R. pp. 23, 24, f. 31) W. R. Wallace owned a substantial amount of stock in each of these companies and his son took over the active operation of the gasoline business. Both the Bennett and Wallace families were interested in two similar companies in Ogden, and it was deemed advisable to separate the interests of the two families, which was done by having the Bennett family take over the Wallace interest in the Bennett Glass & Paint Company, in exchange for which the Bennett family transferred to Wallace their interest in the Bennett Gasoline & Oil Company and the two Ogden companies. Since John Bennett was president of the taxpayer, it followed the Bennett faction. (R. pp. 24, 25; ff. 31, 32, 33)

It exchanged stock of Ogden Glass & Paint Company, Bennett Gasoline & Oil Company and Ogden Gasoline & Oil Company, which had cost it \$10,500, cash of \$53.10 for 288 shares of stock of Bennett Glass & Paint Company and \$1,479.53 in cash. (R. pp. 22, 24, 10) This stock was reported by the taxpayer in its income tax return to have been received "at trading price of 117.00 per share" and upon that basis a profit was reported upon the exchange. In computing the deficiency now in litigation the Commissioner determined that the stock of Bennett Glass & Paint Company, received by appellant on the exchange, had a value of \$117.00 per share, or a total value of \$33,696, (R. p. 22, f. 28), and made other adjustments in the income of the taxpayer which are not in dispute. The single issue in dispute before the Board of Tax Appeals was the market value of 288 shares of Bennett Paint & Glass Company stock received by the taxpayer upon this exchange.

The business of Bennett Glass & Paint Company was the sale of paint and glass at wholesale. (R. p. 24, f. 31) Before this exchange of stock took place, Bennett Glass & Paint Company had also acted as purchasing agents for the gasoline which was sold by Bennett Gasoline & Oil Company. The revenue from this source had varied from \$25,000 to \$35,000 per year. Bennett Glass & Paint Company was also buying and selling lubricating oils, the profit from that business being between \$10,000 and \$12,000 per year. As a part of this exchange of stocks between the two families and the disassociation of the Glass & Paint Company and the Gasoline &

Oil Company, Bennett Glass & Paint Company lost these sources of revenue, totaling from \$40,000 to \$50,000 a year. The corresponding saving in expenses was between \$14,000 and \$15,000 per year, or a loss of net revenue of between \$25,000 and \$35,000 yearly. (R. pp. 25, 26, f. 34)

The net earnings of the Bennett Glass & Paint Company for the years 1923 to 1928, before this loss of revenue, had been approximately \$42,000 per year. It had paid dividends of \$36,000 per year or 6% upon the 6,000 shares of outstanding capital stock. (R. p. 26, f. 23)

There had been no sales of the stock of the Bennett Glass & Paint Company between 1900 and 1928. (R. p. 25, f. 33) Two disinterested and qualified witnesses testified that in their opinion the 288 shares of stock of Bennett Glass & Paint Company received by the taxpayer had a market value of from \$25 to \$30 per share. (R. p. 29, f. 39; p. 30, f. 40) No objection was made to the competency, qualifications, impartiality, or ability of the witnesses. No conflicting or contradictory testimony was introduced. The Board of Tax Appeals held that the evidence did not "overcome the *prima facie* determination" of the Commissioner, failed to make any determination of the value of the stock and ruled that since the evidence was insufficient to permit a determination of the fair market value of the stock, the determination by the Commissioner must stand.

Errors Relied Upon

The errors assigned and upon which the appellant relies are as follows:

1. The Board erred in not finding that the stock

of the Bennett Glass & Paint Co. received by petitioner in the exchange that occurred in 1928 had a fair market value not in excess of \$25 per share.

2. The Board erred in finding that the stock of Bennett Glass & Paint Co. received by the petitioner in 1928 as a result of the exchange had a fair market value in excess of \$25 per share.

3. The Board erred in finding that the stock of the Bennett Glass & Paint Co. received by petitioner in 1928 as a result of the exchange of stock had a fair market value of \$117 per share.

4. The decision of the Board is contrary to the uncontradicted and uncontroverted evidence before it.

5. The decision of the Board is not supported by the evidence.

6. The Board based its decision upon statements of fact and conclusions therefrom which find no support in the record and which, in some instances, are directly contrary to the evidence.

7. There is no evidence in the record to support the finding of the Board that the stock of the Bennett Glass & Paint Co. received by petitioner in the exchange that occurred in 1928, had a fair market value of \$117 per share.

8. The Board erred in finding any deficiency in tax as regards the petitioner and in not finding that the petitioner had overpaid its taxes for 1928.

Summary of Argument

I. Upon an exchange, the taxpayer is taxable only upon the difference between the cost of the property

surrendered and the fair market value of the property received, plus cash received.

II. The stock of Bennett Glass & Paint Company received upon the exchange did not have a fair market value of more than \$25 to \$30 per share.

III. The decision of the Board is contrary to the uncontradicted evidence, and is not supported by any evidence.

IV. The decision of the Board is based upon its erroneous assumption that it may reject testimony of expert witnesses, in its uncontrolled discretion.

ARGUMENT

Point I

Upon an exchange, the taxpayer is taxable only upon the difference between the cost of the property surrendered and the fair market value of the property received, plus cash received.

Section 111 of the Revenue Act of 1928, so far as applicable here, provides:

“(a) *Computation of gain or loss.* * * * the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113.

“(c) *Amount realized.* The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.”

Section 113 provides that the basis for determining gain from the sale or other disposition of property acquired after February 28, 1913, shall be the cost.

There is in this case no dispute as to the cost of the property surrendered in the exchange, or as to the cash received and paid in the exchange. The single factor in dispute in computing the profit is the value to be given the 288 shares of stock of Bennett Glass & Paint Company, which were received upon the exchange. Under the express terms of the law, these shares are to be included in the computation of gain at their "fair market value."

Point II

The stock of Bennett Glass & Paint Company received upon the exchange did not have a fair market value of more than \$25 to \$30 per share.

The facts which led the taxpayer to exchange the stock which it owned in Bennett Gasoline & Oil Company, Ogden Gasoline & Oil Company and Ogden Paint & Glass Company for 288 shares of Bennett Glass & Paint Company are set out above in the statement of facts.

Before the exchange the Bennett and Wallace families were interested in all four companies in approximately the same proportions. It was deemed advisable to separate the interests of the two families. To do this the Bennett family accepted that portion of the stock of the Bennett Glass & Paint Company that was held by the Wallace family and delivered to the Wallace family the Bennett holdings in the three other companies. The taxpayer joined the Bennett group and received 288 shares of the stock of Bennett Glass & Paint Company.

As a part of the exchange of stock, the Bennett Gasoline & Oil Company took over the gasoline and oil business from which the Bennett Glass & Paint Company had theretofore derived net revenues of from \$25,000 to \$35,000 per year. In other words, as a part of the exchange, Bennett Glass & Paint Company lost business which had produced net income of from \$25,000 to \$35,000 per year. The total income of that company before the exchange, including the revenue thus lost, had been approximately \$42,000 per year. In its opinion the Board, while reciting this loss of revenue, gives no weight whatever to it. The court will readily appreciate that a loss by Bennett Glass & Paint Company of from 60% to 80% of its net income is no mean factor to be overlooked and disregarded.

The sources from which this income was derived are stated in the record. The Bennett Glass & Paint Company, while engaged primarily in the sale of paint and glass at wholesale, had developed a business in gasoline and oil. It had organized the Bennett Gasoline & Oil Company to take over that business, but had continued to act as purchasing agent for the gasoline which that company sold. The revenue from this source had varied from \$25,000 to \$35,000 per year. Bennett Glass & Paint Company was also buying and selling lubricating oils, their profit being between \$10,000 and \$12,000 a year. In splitting up the corporations between the two families, Bennett Glass & Paint Company lost these sources of revenue. With this business gone, they were able to effect savings and expenses of between \$14,000 and \$15,000 per year. There was, therefore, a loss

of net revenue of between \$25,000 and \$35,000 yearly, as compared with earnings before this of \$42,000 a year.

Since there had been no sales of Bennett Paint & Glass Company stock, it was necessary to resort to "the opinion of intelligent men experienced in the business" for the purpose of fixing the fair market value of the stock of Bennett Glass & Paint Company at the time it was received by the taxpayer. See *Heiner v. Crosby*, 24 Fed. (2d) 191.

Edward L. Burton testified that he had been engaged in the investment banking and brokerage business in Salt Lake City for upwards of thirty years, that he bought and sold for his own account and for others, both listed and unlisted securities, this being substantially all of his business. He stated that he was familiar with most of the markets for listed and unlisted securities in Salt Lake City in 1928 and knew the Bennett Glass & Paint Company in that year. The facts with respect to the capitalization of the petitioner, its earnings for a period of five years, its dividend payments for five years, the loss of business and income sustained as a result of the exchange, the savings anticipated by reason of this loss of business, the fact that the stock was closely held were all stated to the witness and he was asked if he could state whether the 288 shares of the capital stock of the Bennett Glass & Paint Company could have been sold and, if so, for approximately what price. The witness stated that the stock was not worth over \$25 to \$30 per share marketwise and could not have been sold at \$30. There was no cross-examination of the witness. (R. pp. 26 to 30.)

Mr. Adams, Vice President of the Utah State National Bank, with whom Bennett Glass & Paint Company did its banking business, had been called as a witness for the taxpayer. This case was reached for trial late in the afternoon and was the last case on the calendar of the Board for hearing in Salt Lake City. When the time for his testimony arrived, Mr. Adams was engaged in a conference at the Federal Reserve Bank. Counsel for the Commissioner wished to complete the trial of this case in order that he might go on to Seattle where he had other cases pending. The Board Member had agreed to continue the case to the following morning. At the suggestion of counsel for the Commissioner and solely to accommodate him, it was stipulated by both counsel, with the consent of the Board Member, that if Mr. Adams were called his testimony would be to the same effect as that given by Mr. Burton. Under these circumstances, at least as much weight must be given to the stipulation as would be given to the testimony of Mr. Adams had he appeared and testified to the same effect as Mr. Burton.

There is, therefore, in the record the opinions of two qualified witnesses that the stock received by the taxpayer had a market value of between \$25 to \$30 per share and not more than \$30 per share. The basis of their valuation is set out in the record and supports their testimony. There was no contradictory testimony and no impeachment of the witnesses. It was this testimony which the Board saw fit to discard. It is respectfully submitted that the testimony is proper, reasonable of belief, uncontradicted and unimpeached; that it overcame the

prima facie presumption which attaches to the findings made by the Commissioner of Internal Revenue and should have been accepted by the Board.

In *Dempster Mill Manufacturing Co. v. Burnet*, 46 Fed. (2d) 604, this Court said:

“We think it was error to disregard the testimony of this witness, inasmuch as it stands uncontradicted.”

In *Nichols v. Commissioner*, 44 Fed. (2d) 157, witnesses had testified that certain bonds had no market value in 1920. The Court said:

“This testimony overcame the presumption arising from the determination of the Commissioner. The burden then shifted to the Commissioner to support his determination by evidence and this he did not do, nor attempt to do, and accordingly his determination cannot stand. The Board of Tax Appeals disregarded all the positive and affirmative evidence in the case. Its own findings are not predicated upon any substantial evidence and, therefore, its determination is set aside.”

Other cases to the same effect are set out under Point IV.

Upon the basis of this record, the taxpayer is entitled to a valuation of this stock at from \$25 to \$30 per share.

Point III

The decision of the board is contrary to the uncontradicted evidence and is not supported by any evidence.

Under Point II above, there has been set out a statement of the evidence introduced to prove the value of the stock received by the taxpayer. In its opinion the Board recites this evidence in detail; then discards it all on the ground that it is not bound by the evidence. In addition to asserting a right to disregard evidence (as to this, see Point IV), it assigns certain reasons why this evidence is not convincing to it. None of these reasons are entitled to weight. Certainly none of them are sufficient to justify the Board in rejecting the uncontradicted evidence.

A. The Board states in its opinion that the witness who testified as to the market value of the Bennett Glass & Paint Company "knew nothing concerning the assets owned by the Bennett Glass & Paint Company, nor the gross annual business done." This is a statement which finds no support in the record. On the contrary, the witness Borden testified (R. p. 26, f. 35):

"I am in the investment banking and brokerage business in Salt Lake City and have been in such business upwards of thirty years. I think I am fairly familiar with most of the markets for unlisted securities in Salt Lake City in 1928. I knew the Bennett Paint & Glass Company in 1928."

The other witness, Mr. Adams, was Vice President of the Utah State National Bank, with whom Bennett Glass & Paint Company did its banking business and presumably familiar with its affairs. (R. p. 20, f. 40)

Somewhat later in its opinion, the Board points out that the witness, Bennett, gave no testimony concerning the assets of the company which were behind the stock. All of these witnesses were available for questions from counsel for the Commissioner, as well as the Member of the Board if the value of the assets was considered important. In this connection, it must be borne in mind that the Bennett Glass & Paint Company was engaged in the glass and paint business as a wholesaler. Ordinarily one who occupies this position between the manufacturer and the retailer has no need for a large investment in a plant or in an inventory. The record is silent as to the assets but it is more reasonable to assume that they were relatively unimportant than it is to assume, as the Board does, that they were important.

Information as to the assets of a company is always available to the revenue authorities and it is significant that the attorney for the Commissioner did not ask any of the witnesses what assets the company had; neither did the attorney for the Commissioner object to the opinion of the witness on the ground that a statement of the assets was not included in the evidence. Counsel for the Commissioner did not see fit to introduce evidence as to the assets for the purpose of overcoming the uncontradicted evidence introduced by the taxpayer. The

fact that the attorneys for both parties and the witnesses who testified as to value failed to raise any question as to the assets of the company all indicate the relative unimportance of that question. If the Member believed that this was a material fact, it was his duty to have pointed that out when the witnesses were expressing their opinion as to value. If the attorneys for both parties and the witnesses considered that factor immaterial in determining valuation of the stock, and the Board Member was satisfied not to raise the question when the witness was asked to fix the value of the stock, there seems to be little justification for rejecting the positive evidence because evidence might have been introduced upon this additional factor. Further, as we point out below, the Board may not reject uncontradicted testimony on mere conjecture, which finds no support in the record.

In this connection the decision in the case of *Rice v. Commissioner*, 47 Fed. (2d) 99, is important, the court saying:

“Where property is acquired by exchange, it is the fair market value of the property exchanged for that acquired which determines the cost. Neither the book value nor the actual value of the assets of the corporation or trust of this nature determines what its capital stock will bring in the market.” Citing *Bessemer Inv. Co. v. Commissioner*, 31 Fed. (2d) 248; *Southern Pacific Co. v. Muentner*, 260 Fed. 837.

The reference in the Board's opinion to impairment of capital stock is pure speculation on its part. There is nothing in the record from which the Board

can assume that the capital stock remained unimpaired. Further, there is no basis in judicial experience from which a board or court can conclude that the stock of a company whose capital is unimpaired, but whose earning power is impaired, is worth its par value. On the contrary, this court might take judicial notice of the hundreds of corporations whose capital stock remains unimpaired, but is selling far below its par value. The past few years have vividly demonstrated that market value of stock depends upon earnings and prospects much more than upon the capital structure.

B. The Board Member points out and relies upon the fact that when the return was prepared the stock was included as having been received at a "trading value of 117.00 per share." What is "trading value"? May the Board find as law that "trading value" is the same as "fair market value"? The Bennett interests and the Wells interests were exchanging stock of various companies. For the purposes of the trade, they could place any price tag they chose upon these stocks. So long as both parties inflated their stock to the same extent, no one was damaged by an inflated "trading value." "Trading value", in itself, means nothing. It is a purely relative conception. The accountants who prepared the return for this trust, having no personal knowledge of the facts, included the stock in the return at this value, but that is no reason why the beneficiaries of a trust should be forever prevented from correcting the error when it is discovered.

Experience and good sense will tell most persons that there is a distinct difference between "trading

value" and "fair market value." But if court decisions are required to demonstrate this difference, we respectfully call attention to the cases of *Heiner v. Crosby*, 24 Fed. (2d) 191 and *Tex-Penn Oil Company*, 28 B.T.A. 917. In the first of these cases the court found that stock selling on an exchange at from \$15 to \$17 per share had a fair market value of \$22.50. In that case the court said:

"The fact of sales in itself and without regard to the circumstances under which the sales were made, does not conclusively establish their statutory fair market price or value. Sales made under peculiar and unusual circumstances, such as sales of small lots, forced sales, and sales in a restricted market may neither signify a fair market price or value nor serve as the basis on which to determine the amount of gain derived from the sale. In such cases resort must be had to evidence to determine 'fair value'. Offers made in good faith and *opinions of intelligent men experienced in the business are admissible to show fair value.*" (Italics supplied.)

In *Tex-Penn Oil Company*, the Board of Tax Appeals found that stock selling on the curb exchange at from \$47.50 to \$48.50 had a fair market value of \$7 per share.

There is nothing in the record to indicate that the "trading value" stated on the return bore any relation to the fair market value of the stock. Certainly a mere statement of a trading value of \$117 per share is not sufficient to overcome the uncontradicted testimony that the stock had a fair market value of from \$25 to \$30 per share.

C. The Board comments upon the lack of any evidence of the subsequent earnings of Bennett Paint & Glass Company. The Courts and the Board have repeatedly held that where an asset must be valued as of a particular date, subsequent events, such as earnings, may not be introduced in evidence for the purpose of establishing the value.

Ithaca Trust Company v. United States, 279 U. S. 151; 49 S. Ct. 291.

Holters Co., 16 B. T. A. 325, 332.

Dwight & Lloyd Sintering Co., Inc., 1 B. T. A. 179, 185.

In the latter case, the Board said:

“Valuation should be based on facts known at the time they (assets) were acquired. Subsequent earnings cannot be used in the determination unless from past experience or known facts such future earnings might reasonably have been anticipated.”

In this case the taxpayer went as far as the rules of evidence permit and showed what future earnings were anticipated.

Never before has the Board held that subsequent earnings could be used in determining value or that absence of proof of such subsequent earnings was sufficient to overcome uncontradicted testimony based upon the state of facts existing at the time as of which the valuation was required.

It is very evident from the whole tenor of the opinion that the Board has been dazzled by the fact that before the redistribution of the stock of these four companies between the Bennett and Wallace families took place, the Bennett Glass & Paint

Company was earning \$7 per share and paying dividends of \$6 per share. It has failed to give any weight to the uncontradicted evidence that, as a part of the exchange which is here involved, that company lost business which had showed it a net profit of from \$25,000 to \$35,000 per year. This is a factor which must be considered but which the Board refused to consider. We do not believe that this court will permit an opinion to stand which is based upon such a flagrant disregard of the evidence. As we point out below, the Board is bound to follow the evidence and is not privileged to disregard it at will.

Point IV

The decision of the Board is based upon its erroneous assumption that it may reject testimony of expert witnesses, in its uncontrolled discretion.

The Board, in its opinion, states:

“The Board is not bound to accept at face value the testimony of expert witnesses if such testimony is contrary to the best judgment of its members. *Tracy v. Commissioner*, 53 Fed. (2d) 575; *Uncasville Manufacturing Company*, 55 Fed. (2d) 893; *Grand Rapids Store Equipment Corporation v. Commissioner*, 59 Fed. (2d) 914; *Keystone Steel & Wire Company v. Commissioner*, 62 Fed. (2d) 458; and *American Chemical Paint Company v. Commissioner*, 25 B.T.A. 1208.”

None of these cases stand for the principle thus broadly announced, except the Board's own decision in the case of *American Chemical Paint Company* and that decision was reversed by the Circuit Court

of Appeals in 66 Fed. (2d) 381. An examination of the court cases cited will show that the record contained evidence which either contradicted the opinion of the expert or permitted the Board to arrive at a different basis because of facts affirmatively established. These cases, and many others, stand only for the principle that the Board's decision on a question of fact will not be disturbed if supported by the record. They do not stand for the principle that the Board may act arbitrarily or without evidence. The Board is bound to act upon the evidence before it; not upon suspicion, conjecture or doubt unfounded in the record.

In several cases the Board of Tax Appeals has gone to considerable lengths to assert a right to reject opinion testimony with or without any reason in the record for such rejection. Time and again the courts have been called upon to point out to the Board that it must act upon the evidence before it; that it cannot disregard the evidence which is in the record because the Member who heard the case can think of other evidence which, conceivably, might have been produced and might have had a bearing on the case.

In *Dempster Mill Manufacturing Company v. Burnet, Commissioner*, 46 Fed. (2d) 604, this court reversed the Board for disregarding the uncontradicted testimony of an officer of the petitioner respecting the March 1, 1913, value of the stock of a subsidiary. The court said:

“The only witness who testified directly as to the value of the stock of the Florence Company on March 1, 1913, was C. B. Dempster, for forty

years President of the appellant company. It was his testimony that was rejected as being the testimony of an interested witness. We think it was error to disregard the testimony of this witness inasmuch as it stands uncontradicted. The rules of evidence, in a hearing before the Board of Tax Appeals, are not different from those applied to civil procedure in the courts, except that the statutes and regulations should be construed liberally in favor of the taxpayer."

In that case the record before the Board did not show the assets and liabilities of the company whose stock was valued. It did show that the company had been unsuccessful for several years prior to 1913; that it had suffered losses, that experiments to find a new product with which to carry on its business had been unsuccessful. The Board took the position that this testimony overcame the opinion testimony of the expert witness. This court denied the right of the Board to disregard the uncontradicted opinion testimony.

The instant case presents a greater abuse of its powers by the Board. In the case cited, the Board attempted to reject the opinion evidence as not supported by other evidence *in the record*. Here the Board rejects the opinion testimony, not upon any other evidence in the record, but on the ground that other evidence might have been introduced; namely, evidence of capital assets and of earnings and dividends after the date as of which the stock is valued.

In *Chicago Railway Equipment Company v. Blair*, 20 Fed. (2d) 10, the Circuit Court of Appeals for the Seventh Circuit criticizes severely rulings of the

Board that the evidence produced by a petitioner must not only be legal and admissible but also "satisfactory" and "convincing" and "sufficient to convince the Board." After such criticism the Court goes on to state:

"It is a well known rule of law that tryers of fact must be satisfied and convinced if the evidence adduced, fairly considered, preponderates for or against a given proposition. When the evidence before a tryer of fact ought to be convincing, he may not say that it is not. Whether he is a judge or a commissioner, the facts must be fairly and judicially weighed and a determination reached thereon."

The decision of the Board was reversed.

In *Boggs & Buhl, Inc., v. Commissioner*, 34 Fed. (2d) 859, the Circuit Court of Appeals for the Third Circuit had a similar situation where the Board refused to follow opinion testimony. There the court said that the Board

"could not set aside or disregard all the positive and affirmative evidence as to the value of the good will and base its conclusion upon conjecture. It should not have disregarded the only positive and direct evidence as to the value of the good will of the petitioner."

The Court reversed the Board.

In *Pittsburgh Hotels Company v. Commissioner*, 43 Fed. (2d) 345, the same court had another such situation and in that case said:

"The Board, as a general principle of law, may reject expert testimony and reach a conclusion in accordance with its own knowledge, experience

and judgment, but it must itself have knowledge of the subject-matter and experience with it. There is no evidence whatever that the Board has any independent knowledge of the William Penn Hotel or the particular facts which in this case and locality produce depreciation. It could not, therefore, arbitrarily disregard all the affirmative and positive testimony applicable to depreciation in this particular case. The presumption of correctness of the determination of the Commissioner was overcome by the positive testimony of the petitioner which stands unimpeached. It does not appear that the Board itself had any information on which it could predicate a contrary conclusion. It was error, therefore, for the Board to ignore this testimony."

Nichols v. Commissioner, 44 Fed. (2d) 157, is particularly pertinent in the light of the Board's statement that the taxpayer's evidence did not "overcome the *prima facie* determination" of the Commissioner. The question involved was the value of certain bonds. After stating that the petitioner's witnesses had testified in substance that the bonds in question had no market value in 1920, were not acceptable as collateral security, and none of them were paid at maturity, this court said:

"This testimony overcame the presumption arising from the determination of the Commissioner. The burden then shifted to the Commissioner to support his determination by evidence and this he did not do, nor attempt to do, and accordingly his determination cannot stand. The Board of Tax Appeals disregarded all the positive and affirmative evidence in the

case. Its own findings are not predicated upon any substantial evidence and, therefore, its determination is set aside.”

In *Planters Operating Company v. Commissioner*, 55 Fed. (2d) 583, the Circuit Court of Appeals for the Eighth Circuit had before it an appeal from a Board decision involving the value of a hotel lease. That court reversed the Board, saying:

“It is reversible error for the Board of Tax Appeals to disregard competent, relevant testimony when it is not contradicted. * * * We think the testimony of these witnesses, who are qualified and experienced, should have been accorded weight, especially as the record does not disclose that the Board of Tax Appeals had any personal knowledge or experience on which to base a conclusion. *Boggs & Buhl, Inc., v. Commissioner, Pittsburgh Hotels Company v. Commissioner, Nichols v. Commissioner.* * * * Our conclusion is that the finding of the Board of Tax Appeals that the lease had no value when acquired by the petitioner is contrary to the evidence and is not supported by any evidence; and, further, that it was error to reject the testimony of the expert witnesses offered by petitioner.”

In *Rice v. Commissioner*, 47 Fed. (2d) 99, the Circuit Court of Appeals for the First Circuit reversed the Board for its refusal to follow the testimony in determining fair market value of stock.

In *Sioux City Stock Yards Company v. Commissioner*, 59 Fed. (2d) 944, the Circuit Court of Appeals for the Eighth Circuit held that the Board of Tax Appeals has the duty of arriving at some reasonable

conclusion where it has before it substantially uncontradicted evidence and that it may not disregard the evidence. The decision of the Board was reversed.

In *Norfolk National Bank of Commerce*, 66 Fed. (2d) 48, it appeared that the Board refused to accept the facts stipulated by the parties on the ground that the stipulation was not reasonable. In that case the court said:

“We are bound in cases of this kind to accept the facts found by the Board, and also any inferences of fact which may fairly be drawn therefrom, *provided that such facts and inferences are supported by legally sufficient evidence.* But the Board on its part is bound to accept as true the facts stipulated by the parties, and, if it fails to do so, and makes a finding contrary to the evidence or the necessary inferences therefrom, it commits an error of law which the court has power to correct.” (Italics supplied.)

The present case is “on all fours” with several of the cases cited and falls squarely within the principles enunciated repeatedly by all of the Circuit Courts of Appeals. The evidence in this case was clear and uncontradicted. There was no adequate reason why the Board should have refused to accept it and its refusal to do so constitutes an error of law. To quote from the decision of the Court in the case of *Nichols v. Commissioner, supra*, “This testimony overcame the presumption arising from the determination of the Commissioner. The burden then shifted to the Commissioner to support his determination by evidence and this he did not do, nor

attempt to do, and accordingly his determination cannot stand."

Further quoting from the same decision. "The Board of Tax Appeals disregarded all the positive and affirmative evidence in the case. Its findings are not predicated upon any substantial evidence and, therefore, its determination is set aside."

Conclusion

This Court should reverse the decision of the Board and remand the proceedings with instructions to redetermine the tax upon the basis of a value of \$30 per share for the stock of Bennett Glass & Paint Company.

Respectfully submitted,

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COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

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No. 6121

**In the Court of Appeals of the District of
Columbia**

JOSEPH S. WELLS ASSOCIATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

FRANK J. WIDEMAN,
Assistant Attorney General.

J. LOUIS MONARCH,
LOUISE FOSTER,
Special Assistants to the Attorney General.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	3
Summary of argument	6
Argument	7
Conclusion	18

CITATIONS

Cases:

<i>Anchor Co. v. Commissioner</i> , 42 F. (2d) 99	7
<i>Bedell v. Commissioner</i> , 30 F. (2d) 625	14
<i>Botany Worsted Mills v. United States</i> , 278 U.S. 282	8
<i>Chicago Ry. Equipment Co. v. Blair</i> , 20 F. (2d) 10	8
<i>Cliquot's Champagne</i> , 3 Wall. 114	8
<i>Commissioner v. Swenson</i> , 56 F. (2d) 544	8
<i>Crowell v. Commissioner</i> , 62 F. (2d) 51	8, 9
<i>Dempster Mill Mfg. Co. v. Burnet</i> , 46 F. (2d) 604	15
<i>Dwight & Lloyd Sintering Co. v. Commissioner</i> , 1 B.T.A. 179	11
<i>Fesler v. Commissioner</i> , 38 F. (2d) 155	16
<i>Gloyd v. Commissioner</i> , 63 F. (2d) 649	8
<i>Grand Rapids Store Equipment Corp. v. Commissioner</i> , 59 F. (2d) 914	15
<i>Hard & Rand v. Biston Coffee Co.</i> , 41 F. (2d) 625	10
<i>Head v. Hargrove</i> , 105 U.S. 46	15
<i>W. K. Henderson Iron Works & Supply Co. v. Blair</i> , 25 F. (2d) 538	7
<i>William H. Jackson Co. v. Commissioner</i> , 2 B.T.A. 411	12
<i>Kaltenbach & Stephens v. Commissioner</i> , 12 B.T.A. 1009	12
<i>Keystone Steel & Wire Co. v. Commissioner</i> , 62 F. (2d) 458	15
<i>Louisville Cooperage Co. v. Commissioner</i> , 47 F. (2d) 599	8
<i>Lucas v. Structural Steel Co.</i> , 281 U.S. 264	15-16
<i>Mac Master v. Commissioner</i> , 62 F. (2d) 81	16
<i>Moran v. Lucas</i> , 36 F. (2d) 546	13
<i>Muser v. Magone</i> , 155 U.S. 240	8
<i>Nichols v. Commissioner</i> , 44 F. (2d) 157	7
<i>North American Telegraph Co. v. Northern Pac. Ry. Co.</i> , 254 Fed. 417	9
<i>O'Meara v. Commissioner</i> , 34 F. (2d) 390	9

II

Cases—Continued.	Page
<i>Penney & Long v. Commissioner</i> , 39 F. (2d) 849.....	7
<i>Phillips v. Commissioner</i> , 283 U.S. 589.....	8
<i>Saenger Amusement Co. v. Commissioner</i> , 1 B.T.A. 96.....	12
<i>Sanitary Co. of America v. Commissioner</i> , 10 B.T.A. 944....	12
<i>St. Paul Steam Laundry v. Commissioner</i> , 6 B.T.A. 529....	12
<i>Tracy v. Commissioner</i> , 53 F. (2d) 575.....	7
<i>Uncasville Mfg. Co. v. Commissioner</i> , 55 F. (2d) 893.....	15
<i>United States v. Anderson</i> , 269 U.S. 422.....	8
<i>United States v. Chemical Foundation</i> , 272 U.S. 1.....	16
<i>United States v. Mitchell</i> , 271 U.S. 9.....	8
<i>Walter v. Duffy</i> , 287 Fed. 41.....	9
<i>Wessel v. United States</i> , 49 F. (2d) 137.....	15
<i>Wickwire v. Reinecke</i> , 275 U.S. 101.....	8
<i>Williams v. Commissioner</i> , 45 F. (2d) 61.....	16
<i>Wright v. Commissioner</i> , 50 F. (2d) 727.....	9
Statutes:	
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 111.....	2
Sec. 113.....	2
Miscellaneous:	
Regulations 74, promulgated under the Revenue Act of 1928:	
Art. 591.....	3

In the Court of Appeals of the District of Columbia

No. 6121

JOSEPH S. WELLS ASSOCIATION, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
Revenue, Respondent

*ON PETITION FOR REVIEW OF DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is the opinion of the Board of Tax Appeals (R. 9-15), which is reported in 28 B.T.A. 271.

JURISDICTION

This appeal involves income tax for 1928 and is taken from a decision of the Board of Tax Appeals entered June 10, 1933 (R. 15). The case is brought to this Court under a stipulation by the parties for a review by this Court (R. 16) and on a petition for review filed on September 6, 1933

(R. 16-18), pursuant to the provisions of Section 1001-1003 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 109-110, as amended by Section 1101 of the Revenue Act of 1932, c. 209, 47 Stat. 169, 286.

QUESTION PRESENTED

Whether the Board of Tax Appeals was warranted by the showing before it in sustaining the Commissioner's determination that the stock here involved had a fair market value of \$117 per share at the time received.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 111. *Determination of amount of gain or loss.*

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

(c) *Amount realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

SEC. 113. *Basis for determining gain or loss.*

(a) *Property acquired after February 28, 1913.*—The basis for determining the

gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—* * *.

Regulations 74, promulgated under the Revenue Act of 1928:

ART. 591. *Basis for determining gain or loss from sale.*— * * * In determining the fair market value of stock in a corporation, due regard shall be given to the fair market value of the corporate assets on the basic date. * * *.

STATEMENT

The pertinent findings of the Board of Tax Appeals (R. 9-15) with supplementary references to the evidence (R. 20-30) may be summarized as follows:

The petitioner is a corporation organized under the laws of Utah by John Bennett for the heirs of Joseph S. Wells. Mr. Bennett was the executor of the Wells' estate and guardian of Mr. Wells' minor children. He is also the president of the petitioner, and president and manager of the Bennett Glass and Paint Company.

The petitioner owns stock in the latter company and formerly owned stock in the Bennett Gasoline and Oil Company, the Ogden Gasoline and Oil Company, and the Ogden Glass and Paint Company. The principal stockholders in these companies were Mr. Bennett and Mr. W. R. Wallace, but it was decided in 1928 after a series of confer-

ences that the Bennett family would take the stock of the Bennett Glass and Paint Company, and the Wallace family would take the stocks of the other companies.

The petitioner decided to go with the Bennett family and exchange its stock in these three companies for 288 shares of the Bennett Glass and Paint Company. It is agreed that the cost of the stocks surrendered was \$10,500. In making the exchange the petitioner also paid out \$53.10 in cash and received \$1,479.53 in cash.

On its income-tax return for 1928, the petitioner reported the net profit made on the exchange of this stock as being \$23,142.90. That the trading price of the stock it received was \$117 per share is shown by Schedule B of the return in the following explanatory statement (R. 10, 39):

(Received in exchange Bennett Glass and Paint Co. stock at trading price of \$117.00 per share.)

The Commissioner accepted the petitioner's valuation of the stock at \$117 per share but held that the petitioner should have included as a part of the sale price, the \$1,479.53 which it received in cash. A deficiency was accordingly determined in the amount of \$177.54.

Prior to this determination the petitioner had paid a tax for 1928 of \$2,475.27 and then had filed a claim for refund of that amount on the ground that the stock of the Bennett Glass and Paint Company had no fair market value at the time of the

exchange, or if it did, that the value was less than that ascribed to it on the return (R. 5-6). The claim for refund was rejected (R. 7).

At the hearing before the Board of Tax Appeals, the petitioner called as one of its witnesses, the Secretary and Treasurer of the Bennett Glass and Paint Company who testified (R. 25); that there had been no sales of the stock of this company between 1900 and 1928; that there had been some transfers within the family; that this company had 6,000 shares of stock outstanding in 1928 of the par value of \$100 each; that it had regularly paid six percent dividends between 1923 and 1928; and that the earnings during that period were approximately seven per cent, or \$42,000 a year.

The witness stated further that after the Wallace and Bennett interests were divided in 1928, the Bennett Glass and Paint Company no longer acted as purchasing agent for the gasoline of the Bennett Gasoline and Oil Company, and thereby lost from \$25,000 to \$35,000 a year. It also turned over the lubricating oil business which had brought in from \$12,000 to \$15,000 annually. The witness estimated the total loss in gross profits would be from \$40,000 to \$50,000 but explained that the change enabled the Bennett Glass and Paint Company to make a saving of about \$15,000 a year in salaries.

A second witness, an investment banker and broker, testified that he "knew the Bennett Glass & Paint Co. in 1928" (R. 26). In reply to a hypothetical question as to whether under the facts

here the stock of the Bennett Glass and Paint Company could have been sold, and as to what price it could have sold for, he stated that marketwise he would not consider the stock over \$25 or \$30, and he doubted if it could be sold at that price to any one outside the family or the employees of the company. The question did not refer to the "fair market value." It was stipulated that another witness if called would have given testimony to the same effect as to the value of this stock.

The Board found that the evidence was insufficient to overcome the prima facie correctness of the Commissioner's finding and decided that there was a deficiency of \$177.54 (R. 15).

SUMMARY OF ARGUMENT

The Commissioner determined that the stock here involved had a fair market value of \$117 per share at the time of the exchange in 1928. The petitioner had the burden of proving that the Commissioner's determination was incorrect but it failed to meet its burden. So the presumption that the Commissioner's determination was correct was not overcome and persisted throughout the hearing.

In determining fair market value in a case like this one where the stock is closely held, it is proper to consider the various factors which show intrinsic value. These include such factors as earning power, dividends, and value of assets back of the stock.

The evidence offered by the petitioner did not establish the fair market value which it claimed. Instead, the evidence shows a value nearer that determined by the Commissioner and adopted by the Board.

Consequently the Board's finding that the fair market value of the stock was the figure determined by the Commissioner was warranted, and being based on substantial evidence should be sustained by this Court.

ARGUMENT

The primary question here relates to the "fair market value" of the 288 shares of stock which the petitioner received in an exchange made in 1928. This presents a question of fact. *Tracy v. Commissioner*, 53 F. (2d) 575 (C.C.A. 6th); *Anchor Co. v. Commissioner*, 42 F. (2d) 99 (C.C.A. 4th); *Nichols v. Commissioner*, 44 F. (2d) 157 (C.C.A. 3rd). This being a question of fact, the finding of the Board of Tax Appeals thereon should be sustained if based on any substantial evidence. *Phillips v. Commissioner*, 283 U.S. 589; *W. K. Henderson Iron Works and Supply Co. v. Blair*, 25 F. (2d) 538 (App. D.C.).

The Board found that the fair market value of this stock at the time of the exchange was \$117 per share. Its finding is the same as that determined by the Commissioner and it is well established that the Commissioner's determination is *prima facie* correct and must stand unless overcome by substan-

tial evidence. *Wickwire v. Reinecke*, 275 U.S. 101; *United States v. Mitchell*, 271 U.S. 9; *United States v. Anderson*, 269 U.S. 422; *Commissioner v. Swenson*, 56 F. (2d) 544 (C.C.A. 5th). So in the beginning, it is clear that the petitioner here was and still is placed in a difficult situation. It had the burden of proving before the Board that the Commissioner's determination was incorrect. *Botany Worsted Mills v. United States*, 278 U.S. 282; *Gloyd v. Commissioner*, 63 F. (2d) 649 (C.C.A. 8th); *Louisville Cooperage Co. v. Commissioner*, 47 F. (2d) 599 (C.C.A. 6th); *Penney & Long v. Commissioner*, 39 F. (2d) 849 (C.C.A. 4th). And now that the Board has found against the petitioner, it must show that there was no substantial evidence to support the Board's finding. We submit that the petitioner has failed to meet its burden.

The term "fair market value" as applied to this case, means the amount of money which the stock would bring on a sale in an open market between a seller willing but not obliged to sell, and a buyer willing but not obliged to buy. *Cliquot's Champagne*, 3 Wall. 114, 125; *Muser v. Magone*, 155 U.S. 240, 249; *Crowell v. Commissioner*, 62 F. (2d) 51 (C.C.A. 6th); *Chicago Ry. Equipment Co. v. Blair*, 20 F. (2d) 10 (C.C.A. 7th).

No one consideration is ordinarily determinative of what the fair market value is. Its elements are dependent upon the circumstances of a particular case. Earning power is an element which may be

properly considered; also dividends paid and the value of the security behind the stock in question. *Crowell v. Commissioner, supra, Wright v. Commissioner*, 50 F. (2d) 727 (C.C.A. 4th). In other words, in a case like the instant one where there had been no sale for 28 years, factors showing intrinsic value shall be considered. *Crowell v. Commissioner*, 62 F. (2d) 51 (C.C.A. 6th); *O'Meara v. Commissioner*, 34 F. (2d) 390 (C.C.A. 10th); *Walter v. Duffy*, 287 Fed. 41 (C.C.A. 3rd) *North American Telegraph Co. v. Northern Pac. Ry. Co.*, 254 Fed. 417 (C.C.A. 8th). As to the meaning of market value and the elements which may be considered, the court in the last-named case said (p. 418):

The term is, however, frequently used in a figurative sense, as meaning the fair or reasonable value of the property—that is, such a value as the property would have if it were dealt in according to the practices of a market overt. This is the meaning which the term usually has when applied to real property. To prove market value when it is used in this secondary or figurative sense, it is proper to receive evidence of individual transactions, even offers made in good faith for property of like character, the nature of the property, its location, its rental value, the uses to which it can be put, and all the manifold elements which are admissible to show the fair and reasonable value of property which is not so traded in as to give it a market value in the primary sense of the term. * * *

Accordingly where value is an issue, the inquiry may be allowed to take a broad scope. *Hard & Rand v. Biston Coffee Co.*, 41 F. (2d) 625 (C.C.A. 8th). So it was both proper and necessary in trying to determine the fair market value of the stock here to consider all of the various factors which make up the intrinsic value. The petitioner had the burden of showing that these factors did not exist, or of showing that the stock had a lower value, but only a meager quantity of evidence was produced and part of that does not support the petitioner's contention.

To show lack of value, the petitioner relied chiefly on the testimony relating to the lost revenue. While this was a proper factor to consider, it is only one of several, and cannot be properly judged when viewed by itself. To consider the prospective loss of revenue alone is like taking one piece from a picture puzzle and trying to determine what the whole picture is like from that piece.

In order to view this alleged loss of revenue in its proper setting, it should be considered along with other figures showing the general business set-up of this company. This means that the petitioner should have produced evidence as to a number of items, including the value of the assets of the company during 1928; the terms of the agreement under which it gave up part of its revenue, the size of its liabilities, if any; also the amount of its surplus and the value of its good will. Having operated in one community for more than a quar-

ter of a century and having prospered, as shown by its earnings, it is not too much to assume that this company had a valuable good will, and doubtless also a surplus, as the evidence indicates that during the five years preceding the exchange, part of its net earnings were left each year in the business.

The evidence produced by the petitioner does show that the capital stock was \$600,000 in 1928, and as no evidence was given of any impairment of the capital, impairment should not be inferred. Instead we may infer that the company had at least \$600,000 of value back of its stock and with such large assets, we should expect the fair market value of the stock to reflect such value especially in the boom days of 1928.

The petitioner emphasized this company's expectation of losses but did not show that losses were really sustained. As the hearing was held about four years after the exchange here was made, the petitioner could have shown what actually happened but counsel for the petitioner seems to disagree. He points out in his brief (p. 18) that evidence as to subsequent events may not be used to establish value. That is true but as shown in the excerpt from the opinion in *Dwight & Lloyd Sintering Co. v. Commissioner*, 1 B.T.A. 179, which is included in petitioner's brief (p. 18) evidence of subsequent events may be used to corroborate evidence of existing value if there was a reasonable

expectation of such future events on the date the transaction occurred. See also *St. Paul Steam Laundry v. Commissioner*, 6 B.T.A. 529; *Saenger Amusement Co. v. Commissioner*, 1 B.T.A. 96; *William H. Jackson Co. v. Commissioner*, 2 B.T.A. 411; *Kaltenbach & Stephens v. Commissioner*, 12 B.T.A. 1009; *Sanitary Co. of America v. Commissioner*, 10 B.T.A. 944 (reversed by the Circuit Court of Appeals for the Third Circuit, 34 F. (2d) 439, but the court followed this rule and did consider subsequent earnings to corroborate other evidence).

It has often been said that taxes are practical matters and should be treated in that way. It is apparent that this is a transaction which should be viewed from that angle. The petitioner gave up stock which cost it \$10,500. For this it received stock which it contends had a fair market value of not more than \$25 or \$30 per share. But it is admitted that the par value of this stock was \$100 per share and its trading value \$117. If the petitioner's contention is well founded, it actually lost money on this exchange for it not only received stock which could not be sold for what the other stock cost it, but the company lost valuable revenue, and so as a stockholder the petitioner would be affected in future years.

In other words, we are asked to believe that the petitioner here really gave up valuable property rights without adequate compensation therefor; that is, that it in effect made a gift to these three

companies. But it is well established that corporations are not allowed to make such gifts, and it is also well known that it is not their policy or that of any one else in business for a profit to make as bad a bargain as the petitioner would lead us to think that this was.

With no elements of compulsion shown, and human nature being what it is, we cannot assume that this was a bad bargain. Either the agreement (the complete terms of which have not been revealed) gave the petitioner some new sources of revenue or else the parties believed that the difference was made up by giving the stockholders stock which was actually considerably more valuable than that surrendered. The latter seems a logical view, and certainly we should not assume that the price of \$117 was selected as a trading value merely because it showed up well on the company's books. They knew the whole situation and what sources of revenue were being given up. If they, knowing these facts, were satisfied to trade at \$117 per share, it must have been because they thought the stock would be worth that under the conditions of the exchange. So the trading value should be considered along with other elements. Cf. *Moran v. Lucas*, 36 F (2d) 546 (App.D.C.).

That the petitioner treated this trading value seriously and not as an idle gesture is shown by the fact that on its income-tax return it stated that the value was \$117 per share, and that its profit from

the exchange was \$23,142.90 (R. 30). This is an admission against interest. *Bedell v. Commissioner*, 30 F. (2d) 625 (C.C.A. 2d). Such admission could of course be shown to be incorrect, but the petitioner has not produced sufficient evidence to show this. Accordingly such admission should also be considered and this fact together with the evidence of the large capital stock, apparently unimpaired, and the company's record of earnings during the preceding five years support the Board's finding instead of the petitioner's contention.

The petitioner also relied on the testimony of a broker who was called as an expert on value. This witness qualified himself by stating that he was familiar with unlisted securities in Salt Lake City and "knew the Bennett Glass & Paint Co. in 1928", (R. 26). He does not state that he had ever seen a balance sheet of that company or had any specific information concerning it, so we do not know what he knew about the company but we may infer, since none of the company's stock had been offered for sale, that he knew of it only in a general way. This was also doubtless true of the other witness whom the petitioner offered to call. The broker was not asked what the fair market value was, but he was asked, after being told the facts here in evidence, whether he thought the stock could have been sold and at what price. His answer was that "marketwise" it would be around \$25 or \$30. It does not appear that either of these witnesses had sufficient information on which to base an opinion.

So under these circumstances the Board was not bound to accept the opinion of such experts. *Head v. Hargrove*, 105 U.S. 46, 47-49; *Tracy v. Commissioner, supra*; *Grand Rapids Store Equipment Corp. v. Commissioner*, 59 F. (2d) 914 (C.C.A. 6th); *Keystone Steel & Wire Co. v. Commissioner*, 62 F. (2d) 458 (C.C.A. 7th); *Wessel v. United States*, 49 F. (2d) 137 (C.C.A. 8th); *Uncasville Mfg. Co. v. Commissioner*, 55 F. (2d) 893 (C.C.A. 2d); *Gloyd v. Commissioner, supra*.

Attention has been called by petitioner to the decision of this Court in *Dempster Mill Mfg. Co. v. Burnet*, 46 F. (2d) 604, but we do not think that this case is in conflict with the above decisions. We do not understand that this Court meant to infer that all opinion evidence must be accepted and that it could not be weighed along with other evidence. Rather we believe that this Court meant that the Board could not arbitrarily cast such evidence aside, and that there should be some basis in the record for the Board's decision. We are in accord with that view but there is evidence here to support the Board's finding. The fact that most of such evidence was produced by the petitioner is immaterial. *Crowell v. Commissioner, supra*.

Foremost in our consideration of this case must be the fact that we begin with a determination by the Commissioner that the fair market value of the stock here was \$117 per share. The petitioner had the burden of overcoming this finding. As pointed out by the Supreme Court in *Lucas v.*

Structural Steel Co., 281 U.S. 264, 271, this was a "heavy burden." It was incumbent upon the petitioner to make it clear to the Board by a preponderance of evidence that the Commissioner's determination was incorrect. But part of the evidence challenges its contention and the rest is insufficient to sustain its burden. So having failed in this, the presumption raised by the Commissioner's determination remained and supports the Board's finding. *Mac Master v. Commissioner*, 62 F. (2d) 81 (C.C.A. 3rd); *Fesler v. Commissioner*, 38 F. (2d) 155 (C.C.A. 7th). This presumption is not only that the Commissioner's finding is correcte but that he acted upon knowledge of the material facts involved. *United States v. Chemical Foundation*, 272 U.S. 1, 15.

The situation in the instant case is similar to *Williams v. Commissioner*, 45 F. (2d) 61 (C.C.A. 5th), and to *Crowell v. Commissioner*, *supra*, in both of which decisions were given against the taxpayers. In the *Williams* case the taxpayer tried to establish fair market value of certain notes merely by showing the daily production of oil from the property. The court there called attention to the fact that the taxpayer did not show the financial status of the maker of the notes, the amount of its surplus, if any, or the value of certain leases. So it was held that the petitioner had not overcome the presumption of prima facie correctness established by the Commissioner's determination and the Board's finding was sustained.

Also in the *Crowell* case, *supra*, the quantity and kind of evidence produced by the taxpayer were similar to that here. No evidence was presented for the Commissioner. The court held there that intrinsic value should be considered, that the taxpayer's own evidence challenged its contention, and that it had not sustained its burden. So the court concluded (p. 54) that it could not find that the Commissioner's determination "was so clearly wrong as to have required a contrary finding by the Board of Tax Appeals."

The whole burden of petitioner's argument is that although the past record of an established business might have justified a value of \$117 per share for its stock if no change had occurred in its business, nevertheless the exchange so affected its future earning capacity that the value of the stock must be fixed by its future prospects rather than its past record. The change relied on is the surrender of business which had produced a gross profit of about \$40,000 per year. In the absence of a disclosure of the entire agreement, which might have revealed some provision which would compensate for the loss of this business, it is a matter of pure speculation whether or not loss of this business would affect the value of the stock in the future. The cases upon which petitioner relies deal with the rejection of testimony which was based upon past events and no case is cited which indicates that the Board must accept a speculative estimate of future earnings as overcoming

a value based upon events which have already occurred. The Commissioner's determination is based upon the facts; the petitioner's case depends upon the accuracy of its estimate of the future. We submit, with confidence, that the rule for which petitioner contends is unsound and would permit the substitution of conjecture for facts.

CONCLUSION

It is respectfully submitted that the decision of the Board of Tax Appeals should be affirmed.

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FEBRUARY 1934.

